

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR THE DISTRICT OF COLUMBIA

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

DISTRICT OF COLUMBIA,

Appellant,

v.

ROBERT H. McNEILL,

Appellee.

ROBERT H. McNEILL,

Appellant,

v.

DISTRICT OF COLUMBIA,

Appellee.

No. 18,569

No. 18,570

630

Appeal From The United States District Court
For The District Of Columbia

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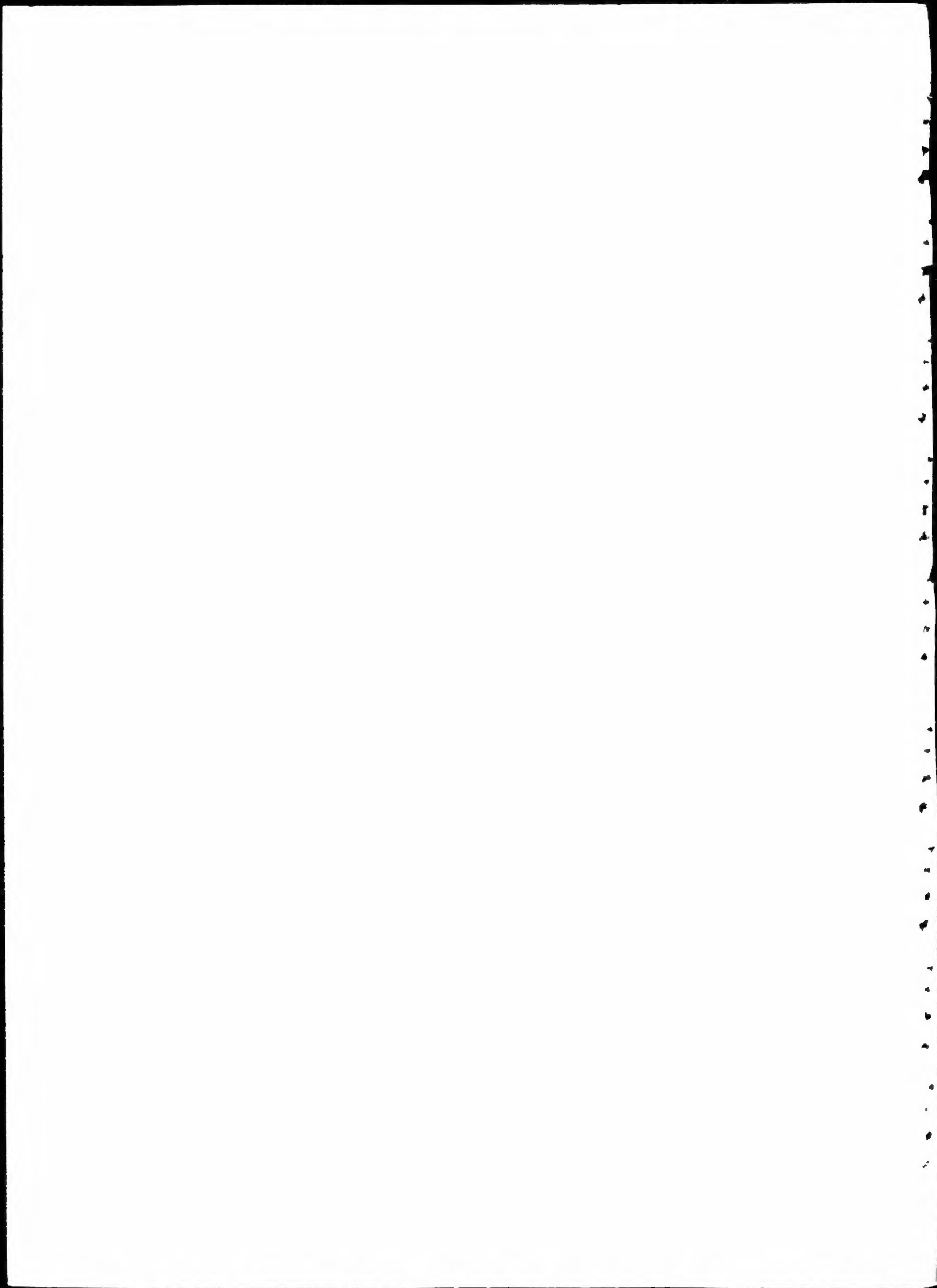
United States Court of Appeals
for the District of Columbia Circuit

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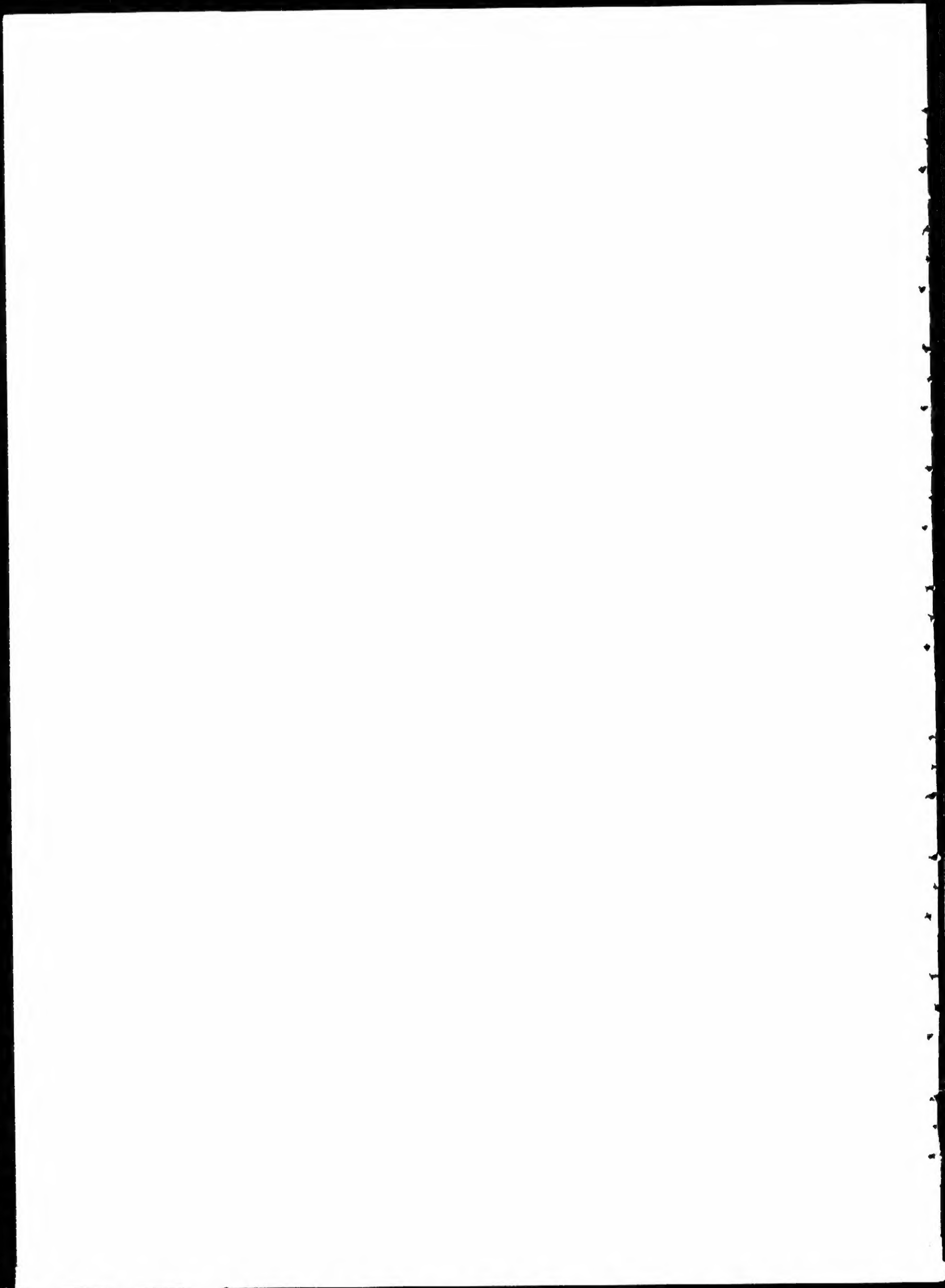


QUESTIONS PRESENTED

1. Where, in a negligence action against the District of Columbia for injury as a result of alleged failure to plow, treat, or remove snow and ice from a crosswalk, did not the court err in failing to direct a verdict for the District where the evidence established, as a matter of law, (a) that the snow and ice did not constitute a "dangerous condition," and (b) assuming, arguendo, that it did, that the District had no opportunity to remedy it?

2. Where, to establish that it did not, prior to McNeill's injury, have an opportunity to remedy the alleged "dangerous condition" caused by snow and ice, did not the District properly introduce, and the court properly receive, evidence of the general operation of the District's snow removal plan and of the absence of specific complaints to the District concerning conditions at the intersection where the accident occurred?

3. Assuming, arguendo, that the District was negligent, was not the evidence of contributory negligence sufficient to support the verdict in favor of the District?



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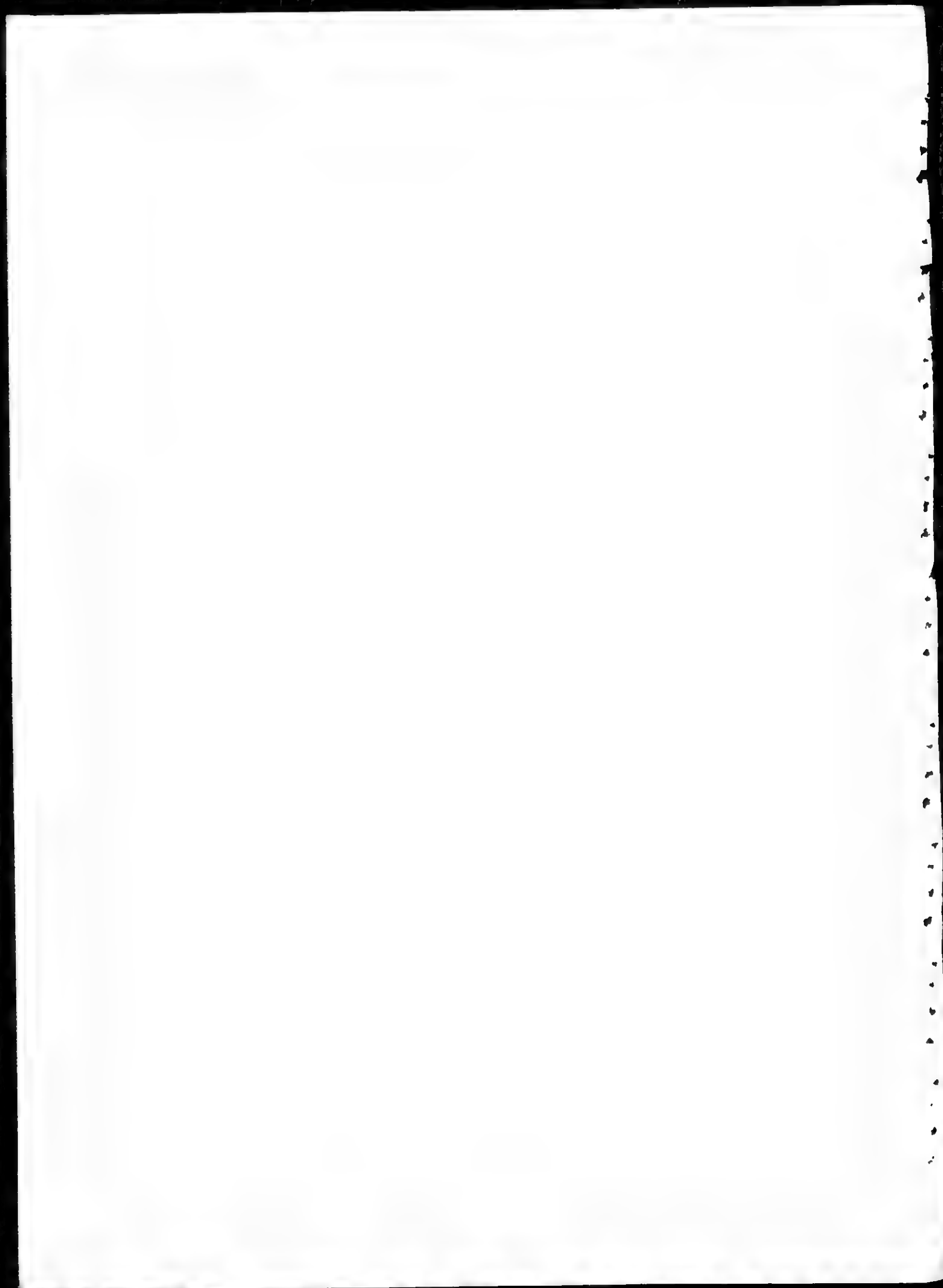
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* Cases chiefly relied upon are marked by asterisks.



UNITED STATES COURT OF APPEALS
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Appeal From The United States District Court
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BRIEF FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

This appeal is from a final judgment of the United States District Court for the District of Columbia, entered December 5, 1963, in an action for negligence (J. A. 32). The jurisdiction of the District Court was invoked under D. C. Code, § 12-208 (1951) (J. A. 3). At the end of McNeill's case, and again at the

end of all the evidence, the District moved for a directed verdict, which motions were denied (J. A. 17, 31). Thereafter, the jury returned a verdict in favor of the District of Columbia (J. A. 31-32). McNeill filed his notice of appeal on January 30, 1964 (J. A. 2, 33), and the District filed its notice of a cross-appeal on February 5, 1964 (J. A. 2). This Court has jurisdiction under 28 U. S. C. § 1291 (1962).

STATEMENT OF THE CASE

The Pleadings

McNeill sued the District for damages for personal injuries sustained as a result of a fall on December 12, 1960, on a snow and ice covered crosswalk at the intersection of Fifteenth and H Streets, Northwest, in the District of Columbia (J. A. 3-4).¹ He alleged in his complaint that his fall was caused by the presence in the crosswalk of snow and ice which was negligently allowed to remain there by agents and employees of the District of Columbia (J. A. 3-4). In its answer, the District denied all allegations of

¹ The plaintiff below, appellant in case No. 18,570 and cross-appellee in case No. 18,569, will be referred to throughout this brief as "McNeill"; the defendant below, appellee in case No. 18,570 and cross-appellant in case No. 18,569, will be referred to throughout this brief as the "District."

negligence contained in the complaint and pleaded contributory negligence on the part of McNeill (J. A. 5).

At the conclusion of the presentation to a jury of McNeill's evidence, the District moved for a directed verdict, which was denied (J. A. 17). Thereafter, upon presentation of all the evidence, the District renewed its motion for a directed verdict, which motion was again denied, and a jury verdict was returned in favor of the District (J. A. 31, 32). Thereafter, these appeals were filed (J. A. 2, 33).

The Evidence

Beginning on Sunday, December 11, 1960, and extending through Monday, December 12, 1960, there occurred in the District of Columbia a snowfall mixed with sleet which covered the ground to a total depth of 8.5 inches of snow and sleet. The sleet and snow fell over a period of 27 hours, beginning at 8:29 a.m. on December 11, 1960, and terminating the following morning at 11:29 a.m. (J. A. 15-16).

Because of the emergency conditions created by the storm, the representatives of the Federal Government, upon the recommendation of the Commissioners of the District of Columbia, ordered into effect traffic emergency plan number five, under

which all Federal and District government employees (except those whose services are indispensable even under emergency conditions) were excused from attendance at work on Monday, December 12, 1960 (J. A. 19-20, 27). Traffic emergency plan number five was put into effect at 5:35 a.m. on December 12, 1960. Previously, at 10:00 a.m. on December 11, 1960, the public was directed to cancel all non-essential motor trips, and, at 3:50 p.m. on the same day, an emergency parking ban was declared, prohibiting the parking of all vehicles on arterial highways (J. A. 27).

The weather conditions created by the storm were described as "very bad" (J. A. 7), as having brought a "great deal of snow" which made pedestrian travel "dangerous" (J. A. 13), as occasioning a "very bad day" (J. A. 17), and as being the "worst" snowstorm of the season (J. A. 29).

Mr. McNeill, at the time of his fall a man 83 years of age, testified that, on December 12, 1960, -- a Monday morning, which he described as being " * * * a very bad morning," -- he went to his downtown office at about 10:00 a.m. (J. A. 7). Before departing for his office, McNeill's wife asked him to remain at home because of the hazardous weather conditions, but he dismissed her suggestion on the ground that "she is a very cautious

person" (J. A. 10, 17). He went out without wearing any sort of protective footwear such as overshoes or galoshes, wearing only "an ordinary pair of shoes" (J. A. 60).

After remaining at his office through the early afternoon, McNeill departed and walked to the corner of Fifteenth and H Streets, Northwest, for the purpose of hailing a taxicab to transport him to his home. He stated that at that time -- about 3:00 p. m. -- snow was still falling, though he wasn't certain whether the snow was being blown by the wind or whether it was falling naturally. (J. A. 7-8, 11.)

Having tried unsuccessfully for some ten or fifteen minutes to hail a cab at Fifteenth and H Streets, he started across the north crosswalk in the intersection, stopped, and, when about 8 or 10 feet from the curb, began to retrace his steps. As he turned in the crosswalk, he slipped on the "snow and ice" and fell to the ground, injuring himself (J. A. 8-9). He described the condition of the snow in the crosswalk as showing " * * * evidence of much traffic on foot and by automobile, and it was in all kinds of shapes and mounded here and depressed there" (J. A. 9).

Mr. Vivian O. Hill, who testified at trial for McNeill, stated that, on the morning of December 12, 1960, he crossed on

foot the intersections at Vermont Avenue and K Street and Fifteenth and Eye Streets, Northwest, and observed conditions at the intersection of Fifteenth and H Streets, Northwest; he described the condition of the intersections as being rutted, as looking "dangerous" and as being covered by "a great deal of snow" (J. A. 13-14).

The wife of McNeill -- Cora Brown McNeill -- testified that, when on the morning of December 12, 1960, she learned that her husband intended to go to his office, she attempted to persuade him not to go on account of the "very bad" weather conditions (J. A. 17).

Thereafter, the District of Columbia moved for a directed verdict, which motion was taken under advisement (J. A. 17). While the record does not reflect what action the court took on the District's motion, trial was resumed and the District went forward with its evidence.

Testifying on behalf of the District was Mr. William F. Roeder, then Deputy Superintendent (now Superintendent) of the Division of Sanitation of the District of Columbia, who stated that he had, for the past eight years, been assistant to the officer in charge of snow removal operations (J. A. 17-18), and that he had

been involved in snow removal for a period of 17 years (J. A. 18).

He stated that, in order to cope with the annual winter snow and ice removal from the streets, highways, and sidewalks in the District of Columbia, an extensive and detailed snow removal plan has been formulated (J. A. 19); that under this plan are provided detailed schedules and priorities for plowing, treating, or removing snow and ice from 1,265 miles of streets and highways, 2,200 miles of sidewalk, and 7,500 intersections within the District territorial boundaries (J. A. 24-25).

Also a part of the plan are provisions for controlling parking and the flow of traffic on the streets and highways. These plans are called "traffic emergency plans" and provide for (1) a declaration of the existence of a traffic emergency, (2) the early dismissal of government employees from the various departments and agencies, (3) a warning that non-essential trips be canceled, (4) restriction of parking on certain predesignated arterial highways, and (5) excusing of all but non-essential government employees from attendance at work (J. A. 19-20).

On December 11th and 12th, the following steps were taken in accordance with the predetermined emergency plans for plowing,

treating, and removing snow and ice from the public ways: After District officials received weather predictions of snow for the area, 99 truck sanding crews were ordered on standby at 7:00 a.m. on December 11th. When the first snow and sleet began to fall at about 9:00 a.m., these crews were ordered to begin sanding operations (J. A. 20, 27-28). At about noon when it appeared evident that the snowfall would accumulate to more than 3 inches, 212 snow plows were ordered into operation between 1:00 p.m. and 3:30 p.m. (J. A. 20-23). Crosswalk crews which were to remove snow and ice from the 7500 intersections in the District and hauling crews which were to carry off to appropriate dumping areas snow and ice from the streets were mobilized at 5:00 p.m. and 8:00 p.m., respectively (J. A. 20-21). The crosswalk and hauling crews included a total of 828 men, who utilized 254 trucks (J. A. 24). A grand total of nearly 2,000 persons were engaged on December 11th and 12th in snow and ice removal (J. A. 31).

The crosswalk crews, approximately two-thirds of which were assigned to the downtown area (the area bounded by Fifth and Twenty-first Streets, and Constitution Avenue and K Street, all in Northwest) worked from 5:00 p.m. December 11th until 4:00 a.m. on December 12th and, after a short respite, were again ordered out on the streets at noon on December 12th (J. A. 24, 28-29).

Mr. Roeder testified that, during the particular snow emergency, no specific complaints of an accumulation of snow and ice at the intersection of Fifteenth and H Streets, Northwest, were received by District of Columbia authorities prior to the time of McNeill's fall (J. A. 25-28). During the two-day period of December 11th and 12th, 8.5 inches of snow fell in the District of Columbia, and the storm which accompanied it was described as "the heaviest one we had that winter" (J. A. 29).

SUMMARY OF THE ARGUMENT

I

The court erred in failing to direct a verdict for the District of Columbia because the evidence established, as a matter of law, that (a) the 8.5-inch snowfall of December 11th and 12th, 1960, did not constitute a "dangerous condition," i.e., " * * * the formations which caused or contributed to the injuries are of such size or locations as to be dangerous and unusual in some way other than the original general slipperiness caused by the weather conditions." Campbell v. District of Columbia, infra, at p. 125; but, even assuming, arguendo, that the snow and ice did constitute a "dangerous condition," the three-and-one-half hour hiatus between

the end of the fall of snow and the accident in question did not afford the District sufficient opportunity to remedy it.

II

In determining whether or not the District exercised reasonable care in connection with the snow and ice emergency on December 11th and 12th, 1960, the finder of fact was required to consider evidence of the District's snow emergency plans and the manner in which it responded thereunder in meeting its duty to abate dangerous conditions throughout the entire District.

III

McNeill's acts of venturing out-of-doors under extreme weather conditions without appropriate footwear and in disregard of the traffic emergency plans were properly matters for consideration by the finder of fact as indicating negligence on his part.

ARGUMENT

I

The court erred in failing, after presentation of all the evidence, to direct a verdict in favor of the District of Columbia.

In Smith v. District of Columbia, 89 U. S. App. D. C. 7, 11, 189 F. 2d 671 (1951), this Court set forth the general rule

governing municipal liability for injuries resulting from dangerous accumulations of snow and ice on streets and sidewalks. The rule is that the District of Columbia is liable for injuries caused by dangerous accumulations of snow and ice " * * * [A] if snow or ice has been permitted to remain untreated on a sidewalk or crosswalk and has been formed into humps or ridges or other shapes of such size and location as to constitute a danger aggravated over its original mere slipperiness and unusual in comparison with general conditions naturally prevalent throughout the city, and [B] if such condition has remained for a period of time sufficient to give rise to a constructive notice to the municipal authorities and an opportunity for them to remedy it * * *." Since McNeill proved neither of these necessary elements, the court should have, as a matter of law, directed a verdict in favor of the District of Columbia. See also point number III, infra.

A. The snow and ice condition complained of was not such as to constitute a danger aggravated over its original mere slipperiness, nor was it unusual or different from prevalent conditions throughout the District of Columbia.

As a prerequisite to recovery against the District of Columbia, McNeill was required to show that the snow and ice

accumulations in the crosswalk at Fifteenth and H Streets, Northwest, constituted a dangerous condition, i. e., " * * * that the formations which caused or contributed to the injuries are of such size or locations as to be dangerous and unusual in some way other than the original general slipperiness caused by the weather conditions * * *." Campbell v. District of Columbia, 100 U. S. App. D. C. 120, 125, 243 F. 2d 226 (1957); Smith v. District of Columbia, supra. "Mere accumulations" of snow and ice do not constitute such dangerous or unusual conditions sufficient to permit recovery.

Further, in determining whether or not a dangerous or unusual condition existed, a distinction must be made between accumulations of snow and ice on a public sidewalk and those on a crosswalk; for, as to the latter, a different and lesser standard of municipal care is requisite. In Smith v. District of Columbia, supra, at p. 11, this Court observed:

"The factual requirements [i. e., the standards of care] as to sidewalks and crosswalks are different, because sidewalks are designed primarily for the use of pedestrians whereas crosswalks are narrow designated portions of the street or roadway, and the street or roadway itself is designed primarily for the use of vehicles. And, again, a sidewalk once

cleared tends to remain clear until further precipitation, but continuous vehicular traffic across a crosswalk tends to throw snow or slush on it no matter how often it is cleared, so long as the street itself contains snow or slush."

And see also: 19 McQuillin, Municipal Corporations, § 54.65 (3d Ed., 1949).

Certainly, the accumulation of snow and ice on which McNeill slipped was not "unusual or exceptional." He testified that, as he fell, " * * * my impression was at the time that I was slipping on ice under snow" (J. A. 9). Although he further described the condition of the ice and snow as being "mashed down by traffic" and as "very irregular, nothing harmonious about it, nothing level about it" (J. A. 9), the condition was obviously the natural consequence of an 8.5-inch fall of snow and sleet (which ended just 3 1/2 hours earlier) being mashed, packed, and rutted by much "automobile traffic and by pedestrian traffic" (J. A. 8).

Furthermore, snow and ice conditions at the intersection of Fifteenth and H Streets, Northwest, were no different from those at other intersections in the immediate vicinity. McNeill's own witness testified that the intersections at Vermont Avenue and K Street and Fifteenth and Eye Streets, Northwest, on the same day

as the accident, were rutted, "dangerous," and covered by "a great deal of snow" (J. A. 13). These descriptions indicate, of course, the general and widespread nature of the snow and ice accumulations throughout the District of Columbia.

Clearly, the snow and ice conditions at the intersection of Fifteenth and H Streets, Northwest, were not different from snow and ice conditions present throughout the whole of the District of Columbia, and, therefore, were not "dangerous" within the context of the rule announced in Smith v. District of Columbia, supra, and Campbell v. District of Columbia, supra.

B. Assuming, arguendo,
that a dangerous condition was
created by snow and ice at the
intersection of Fifteenth and H
Streets, Northwest, the District
was without a sufficient opportunity
to remedy it.

There is no disputing that the District had notice of the severe snow and sleet storm and of the general condition of the streets and sidewalks at the time of McNeill's fall. This is apparent from the testimony of the District's only witness, in which he detailed the energetic efforts of District authorities to ameliorate the overall conditions created by the weather. Whether or not

the District can be held to have been negligent, however, depends upon an affirmative finding that the alleged "dangerous condition" * * * remained for a period of time sufficient to give rise to a constructive notice to the municipal authorities and [that there was] an opportunity for them to remedy it * * *." Smith v. District of Columbia, supra, at p. 11. [Emphasis supplied.]

The record shows that, during the 27-hour period preceding McNeill's injury, there was a fall of 8.5 inches of snow and sleet and constant, below-freezing temperatures; that to plow, treat, and remove snow and ice from 1,265 miles of streets and highways, 2,200 miles of sidewalk, and 7,500 intersections within the District, the District employed nearly 2,000 men (some on 12-hour work shifts), 99 sanding trucks, 212 snow plows, and 254 hauling trucks (J. A. 15-16, 22-25, 30-31). The record further shows that, because of the severe disruption created by the heavy snowfall, Traffic Emergency Plans Nos. 3-5 were put into effect and that these plans forbade all non-essential motor trips, banned parking on arterial highways, and excused all government employees from reporting to work (J. A. 27).

In arguing, as he does, that the District was negligent in failing to treat or remove, within 3 1/2 hours after it fell, the

heavy accumulation of snow and sleet from the crosswalk at the intersection of Fifteenth and H Streets, Northwest, he assigns to municipal authorities a burden which this Court has held "incapable of performance" and "simply impossible." In Clark v. District of Columbia, 3 Mackey 79, 88-89, 14 D. C. 79 (1884), the Court said:

" * * * Now, it certainly cannot be maintained that the District authorities are called upon to keep all these streets clear of the millions of tons of snow falling upon them during the winter. Such an undertaking would be incapable of performance, and is simply impossible. * * * Everyone knows that it is dangerous to travel on the streets at such a season and in such weather, and the responsibility must rest with the citizen who runs the risk of slipping and falling, if he goes out at such a time, unless he can show that the city authorities had something more in the shape of notice of the dangerous character of the place where he was injured than that notice which everyone has at such a time." [Emphasis supplied.]

Similarly, the Court, in Smith, said, at pp. 10-11:

" * * * A municipality cannot be held liable for that which is not its fault. So it cannot be held liable for injuries due to snow or ice as or just after the snow has fallen or the ice formed and when the city has had no opportunity to correct dangerous conditions thus created. * * *

* * * * *

"What the municipality is required to do to offset the dangers created by the elements is that which is reasonable under the circumstances. It cannot be required to remove the whole of a heavy snowfall, or to make the middle of the street suitable for pedestrian travel, or to clear the whole of a sidewalk."

In Yonki v. City of New York, 276 App. Div. 407, 95 N. Y. S. 2d 80, 83 (1950), appeal dismissed, 303 N. Y. 852, 104 N. E. 2d 488 (1952), the Court said:

"There is no formula for determining liability on the basis of any ratio between the number of inches of snowfall and the time elapsed before the happening of the accident and, ordinarily, we would agree with plaintiff that these factors, as well as all the other conditions, constitute a jury question. But as the decisions show, not every case under all circumstances makes a jury risk. The combination of facts in a particular case may be such that it falls beyond the realm of a jury risk. We think this is such a case. We hold as a matter of law that 60 hours was not sufficient time under the circumstances to impose upon the city a citywide burden of sidewalk snow clearance."

Because of the ratio in the following cases between the amount of snowfall and the elapsed time between the end of the snowfall and injury, the courts have found no municipal liability as a matter of law: Gudorp v. City of St. Louis, ____ Mo. ____,

372 S. W. 2d 483 (1963) [3.9 inch snowfall and time lapse of 29 1/2 hours]; Soderstrom v. City of New York, 3 App. Div. 2d 838, 160 N. Y. S. 2d 996 (1957) [16.7 inch snowfall and time lapse of 5 days]; Kirsch v. City of New York, 256 App. Div. 903, 9 N. Y. S. 2d 798 (1939), aff'd. 289 N. Y. 684, 45 N. E. 2d 334 (1942) [17.5 inch snowfall and time lapse of 5 days]; Smith v. Town of Lander, 67 Wyo. 121, 215 P. 2d 861 (1950) [8 inch snowfall and time lapse of 3 days]; Goldstein v. Dattelbaum, 258 App. Div. 812, 15 N. Y. S. 2d 1015 (1939) [8.8 inch snowfall and time lapse of 16 3/4 hours]; Bury v. City of Minneapolis, 258 Minn. 49, 102 N. W. 2d 706 (1960) [5 inch snowfall and time lapse of 6 days]; Hoffman v. City of New York, 272 App. Div. 754, 69 N. Y. S. 2d 125, aff'd. 297 N. Y. 735, 77 N. E. 2d 26 (1947) [12.5 inch snowfall and time lapse of 56 hours]; Lenahan v. New York, 253 App. Div. 593, 3 N. Y. S. 2d 209 (1938) [5 or 6 inch snowfall and time lapse of 1 hour].

The case at bar is easily distinguishable from Smith v. District of Columbia, 89 U. S. App. D. C. 7, 189 F. 2d 671 (1951) [7 1/2 inch snowfall and time lapse of 10 days]; Lyons v. District of Columbia, 93 U. S. App. D. C. 278, 214 F. 2d 203 (1954) ["heavy snowfall" and time lapse of 10 days]; and Campbell v.

District of Columbia, 100 U. S. App. D. C. 120, 243 F. 2d 226 (1957), [4 inch snowfall and time lapse of 24 hours]; in which this Court found that the evidence properly presented in each case questions for jury determination.

In the case at bar, the evidence clearly precluded liability of the District of Columbia as a matter of law where the record established, as previously indicated, that an 8.5 inch fall of snow and sleet ended just 3 1/2 hours before McNeill's accident. Aben v. District of Columbia, 95 U. S. App. D. C. 237, 221 F. 2d 110 (1955).

The District's obligation to remove the 8.5 inches of snow and sleet from the crosswalk extended through the period within " * * * the first eight hours of daylight" after it ceased to fall. D. C. Code, § 7-802 (1961) provides:

'It shall be the duty of the Commissioners of the District of Columbia within the first eight hours of daylight after the ceasing to fall of any snow or sleet, or after the accumulation of ice on the paved sidewalks within the fire limits of the District of Columbia * * * to cause such snow, sleet, and ice to be removed; and also to cause the same to be removed from all crosswalks of improved streets * * *.' [Emphasis supplied.]

And see Campbell v. District of Columbia, supra. Here, it must be remembered, there was a hiatus of only three and one-half hours between the cessation of the snowfall and the accident.

II

The court did not err in permitting testimony of the general operation of the District's snow removal plan or in permitting testimony of the absence of specific complaints about snow and ice conditions at the intersection of Fifteenth and H Streets, Northwest.

A.

McNeill contends that the court erred in permitting testimony as to what steps the District took with respect to city-wide snow and ice removal; that, instead, the District should have been confined in its proof to showing only what steps it took with respect to snow and ice removal at the intersection where McNeill slipped and fell. Plainly, his argument is without substance.

As previously discussed herein, one of the elements upon which liability of the District depends is whether or not the municipal authorities, after the expiration of the first eight hours following cessation of fall, had "an opportunity * * * to remedy" the alleged dangerous condition created by snow and ice at the intersection of Fifteenth and H Streets, Northwest. Smith v.

District of Columbia, supra; Campbell v. District of Columbia, supra. It necessarily follows that, in order that the court or jury might determine whether or not the municipal authorities had such an opportunity, proof had to be placed before them of the general conditions created by the snow and ice throughout the city and the municipality's response thereto.

If the proof indicated that, during the 3 1/2 hour hiatus between the end of the snowfall and McNeill's accident, the municipality had taken few or no steps to remove snow and ice from the streets and sidewalks in the District, the jury might have had at least some justification to find that there was an opportunity for the District to remedy an alleged dangerous condition at Fifteenth and H Streets, Northwest, but that it failed to avail itself thereof. A finding of negligence on the part of the District might have flowed therefrom. If, on the other hand, it was shown that the District was diligently engaged during this period in battling the heavy fall of snow and ice throughout the whole of the District of Columbia, then it must follow that the District's failure to remove the snow and ice from the intersection at Fifteenth and H Streets, Northwest, was not negligent (as the jury apparently found), even if there was some showing (which there was not) that this intersection was in different condition from all others.

The essence of McNeill's complaint is that the District failed to treat or remove the snow from the intersection of Fifteenth and H Streets, Northwest, before it plowed, treated, or removed snow from other areas of the District. There was testimony at trial that for the District to plow, treat, or remove an 8.5 inch snowfall from streets and sidewalks in the particular area would require, at a minimum, between 12 and 15 hours (J. A. 30). Thus, snow removal in that area would not have been completed until some 8 1/2 to 11 1/2 hours after McNeill's accident.

The holdings of this Court clearly contemplate the introduction of evidence by the District of its efforts to combat snow and ice conditions throughout the District of Columbia. Smith v. District of Columbia, supra; Campbell v. District of Columbia, supra.

The use of such evidence has been authorized in other jurisdictions. In Mathesen v. City of New York, 188 Misc. 1018, 72 N. Y. S. 2d 437 (1947), the court said:

"In determining whether reasonable care has been used by the City in clearing streets and walks after a snowfall, it is proper to consider the amount of snow required to be moved, the number of miles of sidewalks and roadway, the means and methods used to remove the snow and the condition of the sidewalks in the immediate vicinity."

In Bazinet v. City of Hartford, 135 Conn. 484, 66 A. 2d 117 (1939), the municipality introduced evidence as to general weather conditions throughout the city of Hartford, Connecticut. It also introduced evidence as to the miles of streets and sidewalks, the number of crosswalks, the amount of the snow removal budget, and the working hours and size of the snow removal crews. In approving this procedure, the court, id. at p. 119, said:

'In the determination of whether or not the defendant performed this duty of using reasonable care to keep its sidewalks reasonably safe, it is entitled to have its conduct judged by the way in which it met the whole problem. * * * In the case at bar, not only were the problem and the means provided for solving it presented but the way in which these means were used on the day in question was described. * * * The duty of the defendant was fully performed. When the walks and streets of a city the size of Hartford are sheeted in snow and ice during the night, it would be too much to expect that they should all be made reasonably safe within an hour and a half after sunrise. * * *' [Citations omitted.]

The Supreme Court, in District of Columbia v. Woodbury, 136 U. S. 450, 463 (1890), specifically recognized that the District's burden in caring for the streets and highways is coextensive with its resources and said:

"The District government, as a municipal corporation, is charged with the duty of supervising the streets of Washington, and keeping them in a condition fit for convenient use and safe against accident to travellers using them. But it is not under an absolute obligation to respond for every accident a man may suffer in its streets. It is simply bound to practice due care and diligence in the exercise of its powers and in the application of its resources towards the objects named. * * *" [Emphasis supplied.]

B.

The court did not err in permitting testimony by the District's sole witness that there had been no specific complaints about the snow and ice conditions at the intersection of Fifteenth and H Streets, Northwest. While it is true, as the District concedes, that it had notice of the general slippery conditions created by the city-wide snowfall, the city's liability is not contingent on such general slippery conditions, but rather on conditions " * * * dangerous and unusual in some way other than the original general slipperiness caused by the weather * * *." [Emphasis supplied.]

Campbell v. District of Columbia, supra, at p. 125; Smith v. District of Columbia, supra. Thus, whether or not the District had actual or constructive notice of the alleged dangerous condition of the intersection was an indispensable element of proof which it was

required to meet in order to avoid liability. Smith v. District of Columbia, supra. Since testimony in this regard was vital to the District's case, its introduction was not erroneous.

III

Assuming, arguendo, that the District was negligent, there was ample evidence from which to conclude that McNeill was contributorily negligent.

McNeill urges on this appeal that there was no evidence from which it could be concluded that he was contributorily negligent. Clearly, however, assuming, arguendo, that the District was negligent, McNeill's right to recover was barred by his own negligence.

At the time of the accident, McNeill was a man 83 years of age (J. A. 7). He, himself, described the weather conditions on the morning of his accident as being "very bad" (J. A. 7). Although certain snow emergency plans had been put into effect cancelling all non-essential trips, restricting parking, and excusing all but very essential government employees from attending work (J. A. 19-20, 27), McNeill ventured out onto the streets; and he did so contrary to his wife's expressed wishes that he not go out.

He dismissed her warning with the remark "she is a very cautious person." (J. A. 10, 17.)

Additionally, by neglecting to wear the proper footwear, McNeill ignored the vital safety precaution which might well have saved him from the harm from which he is here seeking relief. Instead of wearing overshoes or galoshes, he tramped through heavy accumulations of snow and ice wearing "an ordinary pair of shoes" (J. A. 10). This fact alone is sufficient to raise a question of contributory negligence. Heether v. City of Huntsville, 121 Mo. A. 495, 97 S. W. 239 (1906); Taylor v. City of Spokane, 100 Wash. 409, 171 Pac. 249 (1918). One who knowingly places himself in a position of peril cannot recover for the harmful consequences resulting from his own plain folly, and there is no rule of reason or of law which would justify such recovery. The court did not err, therefore, in instructing on contributory negligence. Indeed, it should have directed a verdict for the District on that ground.

CONCLUSION

Since McNeill proved neither of the two elements which this Court has determined to be conditions precedent to a finding of municipal liability for failure to treat or remove snow and ice (i. e., the existence of a dangerous condition aggravated over and above its general slipperiness and an opportunity for the District, after notice, to remedy the condition), since his fall occurred only 3 1/2 hours after the cessation of the fall of snow and sleet, and since McNeill was, himself, guilty of negligence which contributed in direct measure to his injury, it is respectfully submitted that the case be remanded to the District Court with directions to enter judgment for the District as a matter of law. Alternatively, it is submitted that the judgment of the court below be affirmed.

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BRIEF FOR THE APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,569

DISTRICT OF COLUMBIA,

Appellant,

v.

ROBERT H. McNEILL,

Appellee.

Appeal from the United States District Court
for the District of Columbia

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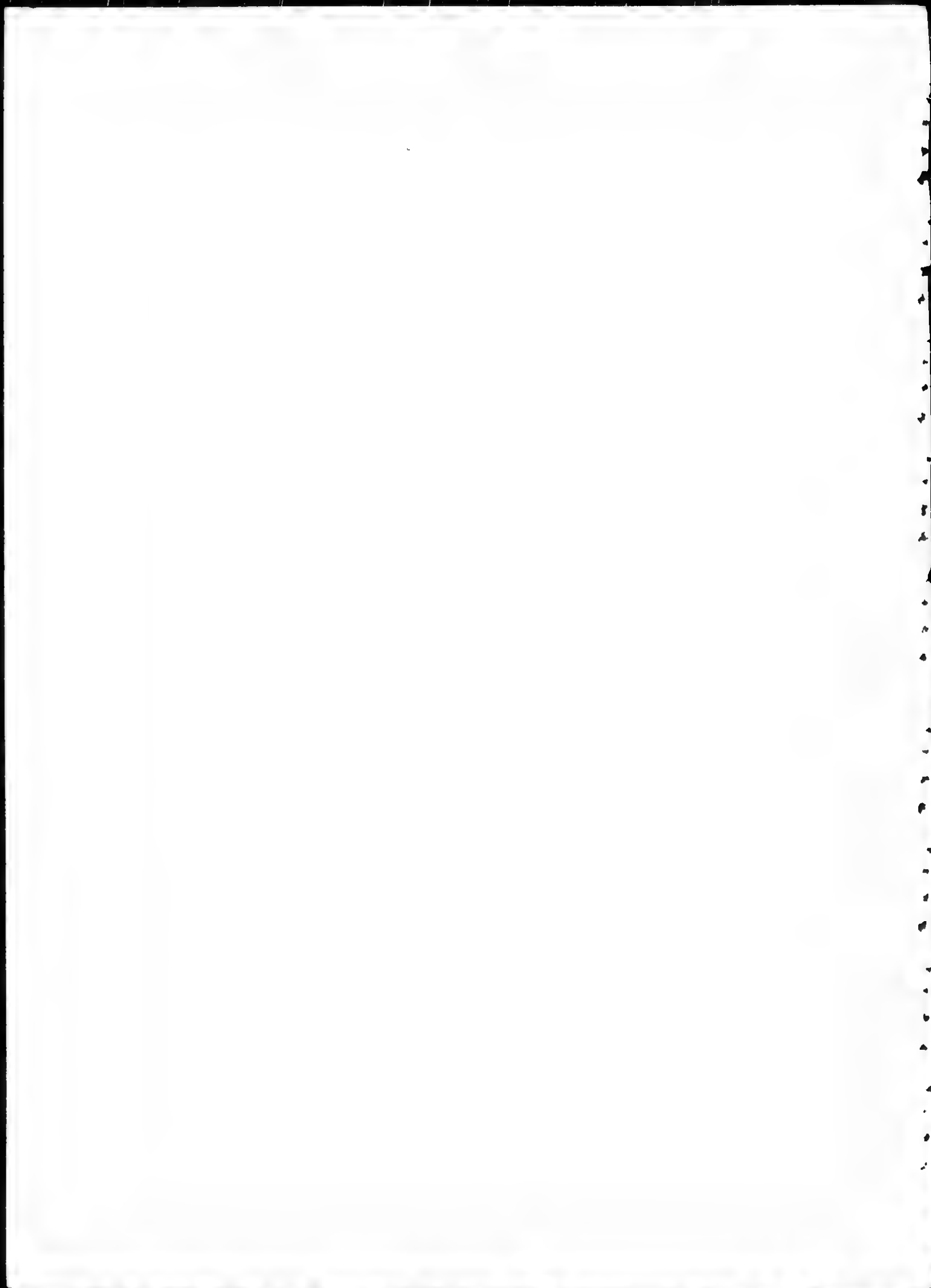
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United States Court of Appeals

1964



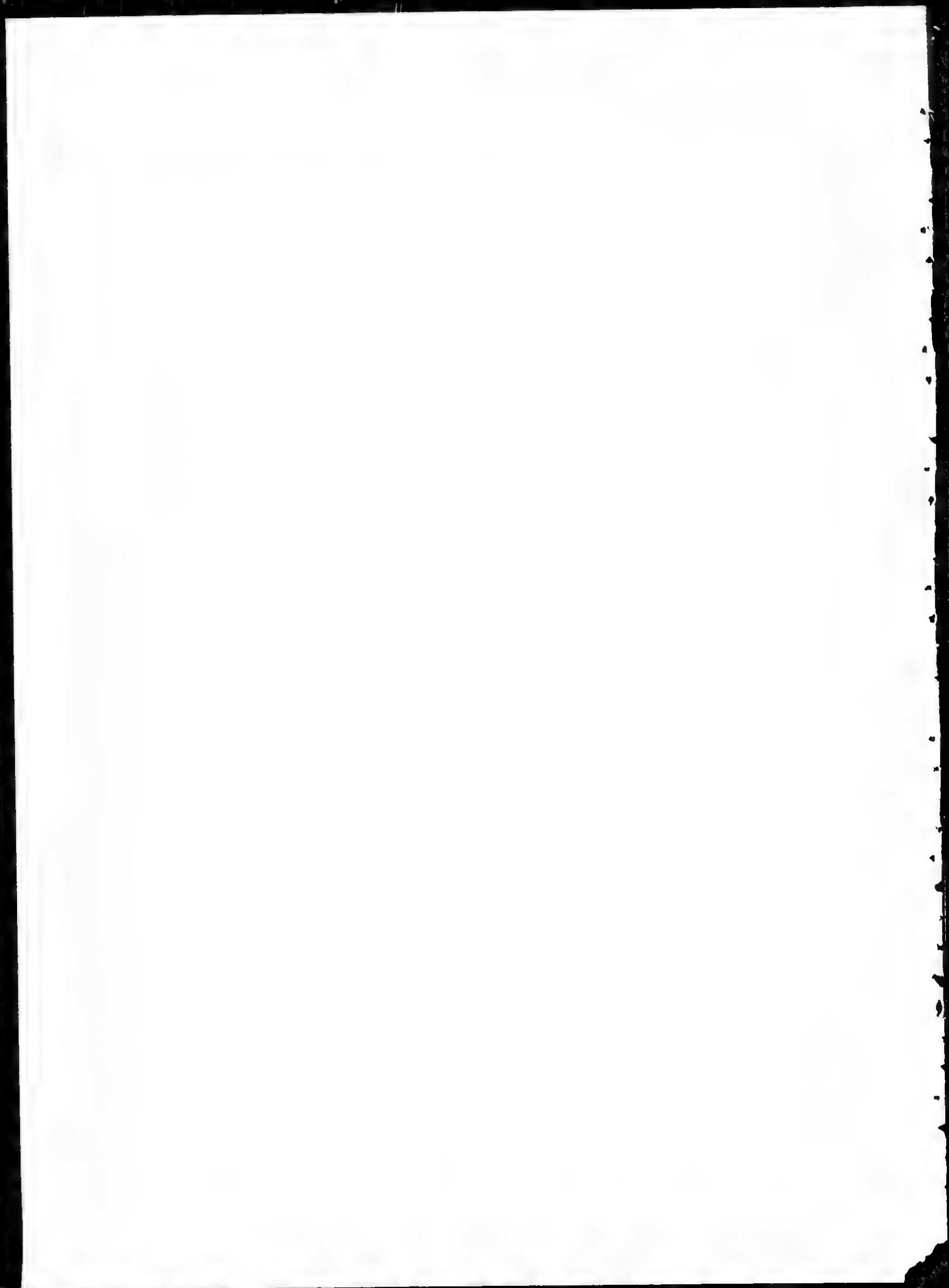
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QUESTIONS PRESENTED

1. Where in a negligence action against the District of Columbia for injury as a result of alleged failure to remedy a condition or ruts and ridges of ice and snow from a particular intersection did not the Court properly overrule the District's motion for a directed verdict (a) for the reason that the evidence showed such to constitute a "dangerous condition" under the rule established by this Court in such circumstances and (b) for the reason that evidence disclosed that the District had ample opportunity to remedy the condition.

2. Where the District in attempting to establish that it *did* take action to remedy the condition in question, did not the Court err in permitting the District the introduction of evidence to infer that it had in fact alleviated said condition by showing general snow removal operations in the city to imply that certain of these operations were in effect at the intersection in question.

3. Was not the evidence introduced by the District to show contributory negligence lacking in the requirement that such facts have causal connection with the injury sustained or contributed to the proximate cause of the accident.



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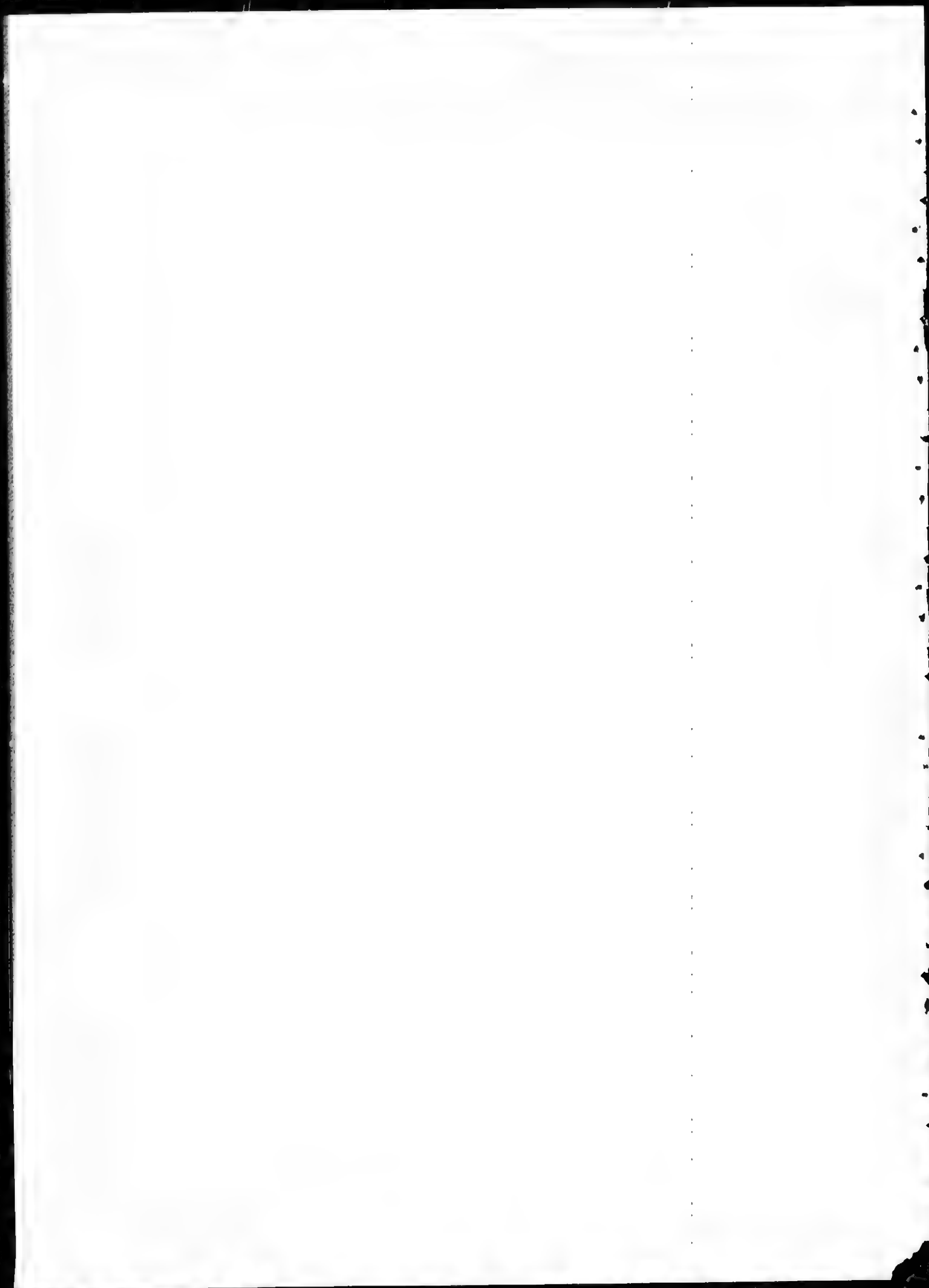
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Appeal from the United States District Court
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BRIEF FOR THE APPELLEE

JURISDICTIONAL STATEMENT

Jurisdiction of this appeal has been reflected in the Briefs filed on behalf of Appellant in consolidated Appeal, No. 18,570, and in Appellant's brief in this appeal.

STATEMENT OF THE CASE

The case is stated for the Appellee here in his Appellant's brief in Appeal No. 18,570, consolidated with this appeal by Order of this Court.

SUMMARY OF THE ARGUMENT

I.

A. The Court properly refused to direct a verdict for the defendant, the District of Columbia, and did not err as contended by the Appellant, because the evidence of ridges, humps and ruts of snow and ice constituted a "dangerous condition" over the mere slipperiness of these substances and such evidence described a condition likened unto those that this Court has passed upon and held to constitute a dangerous condition.

B. Nor did the Court err in refusing to grant the defendant's motion for a directed verdict on the grounds that the District of Columbia did not have ample time to remedy the dangerous condition for the evidence disclosed that they did, in fact, have time and opportunity to do so or that under any circumstances the evidence on the question of whether the District had ample time and opportunity to remedy the "dangerous condition" presented a question for the jury.

II.

The Court erred in permitting testimony of the general operations of the District's snow removal plan on the occasion of the snow storm in question, in that such evidence was used to infer that these operations were, in fact, being affected at Fifteenth and H Streets, N. W., where the accident occurred, and were used to rebut the plaintiff's evidence that no steps had been taken to remove or make harmless the dangerous condition existing at that particular intersection. In that sense, such

testimony and other evidence was purely hearsay under the authorities. Since the testimony was based upon reports received from various and diverse sources, such evidence was, in fact, hearsay upon hearsay.

III.

The jury's verdict for the defendant was against the weight of the evidence in that it was not ample to bear a recovery on the grounds of contributory negligence as charged by the Court and argued by the Appellant. The evidence alleging contributory negligence was lacking in requirement that it had no causal connection with the injuries sustained or contributed to the proximate cause of the accident.

ARGUMENT

I. (a)

The Formation of Snow and Ice Testified to by the Plaintiff and a Witness Constituted a Very Dangerous Condition Over and Beyond the Mere Slippery Nature of Snow and Ice.

The District of Columbia, like the Appellee, recognizes that the kind of formations of ice and snow that have been found by this Court to constitute a dangerous condition are clearly described in *Smith v. District of Columbia*, 89 U.S. App. D.C. 7, 12; 189 F.2d 671 (1951). A comparison of the description of the condition existing at Fifteenth and H Streets, N. W., in the instant case and the condition described in the *Smith* case could lead only to the conclusion that a dangerous condition did exist at Fifteenth and H Streets, N. W., within the meaning of the *Smith* case. In the instant case, the plaintiff used this language to describe the condition "and it was in all kinds of shapes and mounded here and depressed there," ". . . it was very irregular, nothing harmonious about it, nothing level about it, it had been mashed and crushed and little mounds here and there. I noticed that as I passed over it because it was rough and I had to take careful steps." (J.A. 9), and the

witness testified, ". . . and was snow and traffic marks north and south, two lanes, where automobiles would beat the snow down. It was icy, and between those places there was mounds of snow that hadn't been beaten down. It had footprints in it, and it was very cold and frozen.", ". . . there was two lanes of automobile traffic which had the snow beaten down; and in between where the automobile tires had not run, the snow was still there; and it that snow, there was evidence of people having walked across it; and it was all frozen" (J.A. 12). The witness in the *Smith* case described the conditions existing there as "rough," "bumpy," "uneven," "trampled down," "slippery" and as having a hard crust upon it. The likeness of the conditions described is classical. If a dangerous condition was found to have existed in the *Smith* case, then the District's contention that one did not exist in the instant case would certainly seem untenable. In the case of *Campbell v. District of Columbia*, 100 U.S. App. D.C. 120, 122; 243 F.2d 226 (1957), the ice proportions on the street were described as being only about "an inch or an inch and a half" high. Such description of the conditions in that case would seem to be much less dangerous than those that are now the subject of this appeal. Certainly, the evidence depicted a condition far more dangerous than the original mere slippery nature of ice and snow.

The further contention of the District of Columbia that the plaintiff's evidence did not present a jury question for the reason that such evidence failed to disclose that the condition described was different from those which existed in other intersections was evidently deduced from certain language appearing in the *Smith* case, *supra*, at page 11, where the Court referred to snow or ice "formed into humps or ridges or other shapes of such size and location as to constitute a danger aggravated over its original mere slipperiness and unusual in comparison with general conditions naturally prevalent throughout the city." Whatever might have been the merits of the District's contention here, on this point, are moot in view of this Court's finding upon this very

question in *Campbell v. District of Columbia*, *supra*, 100 U.S. App. D.C. 120, at page 125, 223 F.2d 226. Where this Court stated "the language from the *Smith* case quoted above should not be construed as necessarily requiring as an essential element for recovery, a showing that the formations of ice and snow complained of are entirely unique and that similar ones exist no where else in the city — a showing which might be well nigh impossible." When the merits of any other position other than the principle announced in the *Campbell* case are explored to their logical conclusion, the District's position would really be that a person injured because of a dangerous condition at one intersection should be barred from recovery because they had also failed to remedy dangerous conditions at another intersection.

I. (b)

The Plaintiff's Evidence Showed That the District Had Ample Opportunity to Remedy the Dangerous Conditions at the Intersection at Fifteenth and H Streets, N. W., or That Such Evidence Presented a Jury Question on This Issue.

As admitted in the District of Columbia's brief, for some twenty-seven hours prior to McNeill's injury the District was on notice that snow and ice had accumulated on its streets. The intersection in question, Fifteenth and H Streets, N. W., is one of the busy intersections in what is sometimes termed the financial district of down-town Washington. From the evidence, it is abundantly clear that representatives of the District concerned were present in the down-town area as a result of the snow fall in question. Certainly, in this twenty-seven hour period the District of Columbia either knew or should have known of the condition that was in the presence of being created in this intersection. The District's own evidence showed that with its knowledge and plans it had the facilities to have rectified the condition long before the accident occurred.

"Answer. That is right. The route covering Fifteenth Street would normally have two plows on it, and the route on H Street would normally have two plows on it." (J.A. 29)

The plaintiff's evidence was that absolutely no efforts had been made to remedy the situation at Fifteenth and H Streets, N.W. Testimony of the witness, Vivian O. Hill, was as follows:

"Q. Did you see any evidence of any snow removal in that area?

"A. At that time I did not." (J.A. 12)

"Q. I ask you now, Mr. Hill, as you stood there and looked out into the area that you have described to us, did you see any sand or ashes or any salt having been placed there in that area that we are now talking about?

"A. No, I did not.

"Q. Did you see any men working around and digging and chopping or removing snow of any kind?

"A. No, I did not." (J.A. 13)

Under these circumstances, the District's contention is erroneous in asserting that they had only three and one-half hours to rectify the condition under the formula that there had been some snow just three and one-half hours before the plaintiff's accident, and reasoning that the District of Columbia Code provisions, found in D. C. Code, Section 7-802 (1961) requiring the Commissioner to remove snow and ice accumulations within eight hours of daylight after the ceasing of snow to fall. Their own evidence discloses that for some twenty-seven hours they had been working on the streets as the snow fell intermittently during such period. The proposition that the street should have been free of snow and ice within the eight hour period prescribed by the Statute is not the test here, as it was not the test in the *Campbell* case. But, rather, whether the District had been negligent in not alleviating a dangerous

condition at a busy intersection which it either knew or should have known existed. Therefore, the numerous authorities cited by the Appellant are of no moment here.

II.

The Court Did Err in Permitting Testimony of the General Operations of the District's Snow Removal Plan in that such Evidence Was Used To Infer that the Operations Were Being Effected at Fifteenth and H Streets, N. W., and To Rebut the Plaintiff's Evidence that No Steps Had Been Taken To Remove or Make Harmless the Dangerous Condition.

The Appellee here as the Appellant in companion Appeal No. 18,570, contended that the Court erred in permitting the District to introduce evidence in the manner that it did of its general plans and operations for removing the snow from the City of Washington during the particular snow fall involved. Insofar as the Appellee's position is set forth in its brief as an Appellant in the other appeal, they will not be repeated, and he addresses himself here to answering certain matters raised by the District on this point. The statement found on page 22 of Appellant's brief stating "the essence of McNeill's complaint is that the District failed to treat or remove the snow from the intersection of Fifteenth Street and H Street, N. W., before it *plowed, treated, or removed snow from other areas of the District.*" (Emphasis theirs), is completely erroneous. The Appellee's contention is that the District failed in its duty to remove a dangerous condition from a busy intersection in downtown Washington, although they had the time, means and equipment to do so. The circumstances related in the authorities cited by the Appellant is admitting of the general efforts of a municipality in removing snow and ice from its streets are unrelated to the question raised by McNeill. The evidence of snow removal in the City of Washington by the District of Columbia was an attempt to show that what they did included operations at Fifteenth and H Streets, N. W.

Although many examples of this can be found in the testimony of the witness Roeder, no clearer indication could be found that such was the intent of the District than when he testified:

"Q. Do you have any records anywhere that reflect the number of plows that were used in connection with plowing operations on Fifteenth Street?

"A. On Fifteenth Street the width of that street would *normally carry two plows* (emphasis supplied).

"Q. How about H Street?

"A. H Street, the width of that street would *normally carry two plows* (emphasis supplied.)" (J.A. 25)

The Court recognized the inference that was being created with the jury in having a description of general operations infer as above illustrated and implying that such work was actually accomplished at the intersection in question. On a number of occasions he called upon counsel for the District for policies that he would connect up such general descriptions of work with performance at Fifteenth and H Streets, N. W.

"THE COURT: I think if counsel can direct the witness' attention to what the plan was with respect to Fifteenth and H Streets at about the time of the accident in this case.

"MR. CLARK: That is all I am talking about.

"THE COURT: That is all we are interested in, do you understand? The plan that was in operation and what was done at Fifteenth and H Streets, Northwest. That is what we want to find out." (J.A. 21)

To prevent redundance and repetition, the Appellee here, the Appellant in case No. 18,570, would not again point to or restate admonitions of the Court and directions to counsel to connect up general performance with accomplishments at Fifteenth and H Streets, N. W. However, the only matter that was ever testified to was what would normally have been done at Fifteenth and H Streets, N. W., but in the final analysis, there was an admission that they could in no wise connect the operations with any work at Fifteenth and H Streets, N. W. The authority cited by

the District, *Mathesen v. City of New York*, 188 Misc. 1018, 72 N.Y.S. 2d 437 (1947), referred to ". . . the means and methods used to remove the snow and the condition of the sidewalks in the immediate vicinity." The oversight of the Appellant in relying on the authority cited on this point is that they refer to a municipality's general responsibility for snow removal, and have nothing to do with the duty imposed by this Court to rectify a dangerous condition over and beyond the inherent danger of snow and ice.

III.

Proximate Cause - Contributory Negligence

To further elaborate and fully sustain the position taken in our original Brief, *i.e.*, that testimony supporting a defense of contributory negligence must be offered and recorded in evidence, showing that some fact or circumstance occurred in which plaintiff was an active participant, and from which evidence the jury might reasonably find or conclude that plaintiff did something which but for such act, he *would not have been injured at all*.

But when it appears from the evidence in the case that plaintiff exercised at all times due and reasonable care in attempting to cross 15th and H Streets on the cross-walk, laid off and maintained by the defendant for crossing purposes, by all those using the cross-walk, with reasonable care, it was serious error for the trial Court to repeatedly charge the jury as though plaintiff had failed to use ordinary care, notwithstanding the uncontradicted evidence.

Joint Appendix pp. 7, 8, and 9 where the duty of defendant is clearly stated by the trial Court but where the Court as clearly, failed to correctly advise the Jury that to determine the question of whether plaintiff contributed to his own injury, the Court should not have emphasized or discussed at all the question of alleged contributory negligence of

plaintiff, because of the failure of defendant to offer evidence showing any act or omission of plaintiff as a basis for any defense by the defendant on that ground.

What must be shown to permit a verdict of the jury based upon alleged contributory negligence by the plaintiff as the proximate cause of his injury?

The prevailing rulings of the Court in this Country may be summarized by quoting §213, Vol. 38, American Jurisprudence, as follows:

"§213. Tests of Proximate Cause. — Generally, the tests which are applied in determining whether the conduct of a defendant is the proximate cause of the injury are applied in determining whether the conduct of the plaintiff contributed proximately to the injury. As it is expressed, the plaintiff's negligence must have entered into and formed part of the efficient cause of the injury. If it appears that the injury would have occurred if the plaintiff had not been guilty of the fault charged against him, a recovery should not be denied on the ground of contributory negligence. In other words, in order to defeat his action the plaintiff's conduct must have contributed to the injury in such a way that if he had not been at fault he would have escaped injury entirely."

The above summary has been approved almost universally by the Courts of the various States and by the Supreme Court of the United States.

Plaintiff committed no act or omission constituting contributory negligence proximately causing his injuries.

See Joint Appendix:

1. Evidence of Robert H. McNeill, pages 7 thru 12.
2. Vivian O. Hill, Joint Appendix, pages 13, 14, 15.
3. Cora Brown McNeill, pages 16, 17 and 18 of Joint Appendix.

From the above quotation of Section 213, Volume 38, American Jurisprudence, it is crystal clear that the only way the Defendant, the District of Columbia, a municipal corporation, can escape liability for its gross negligence is to prove some act or omission by the Plaintiff for the proximate cause of his injury on December 12, 1960 and but for which he would not have been injured at all. There is no escaping the statement just made being the particularly universal holding of American Courts and certainly by this Court.

Smith v. District of Columbia, 89 App. D.C. 7.

Campbell v. District of Columbia, 100 U.S. App. D.C. 120.

A careful reading of all the evidence in the Joint Opinion, of all the witnesses examined by Plaintiff and Defendant, will furnish no item of evidence even tending to show that some act or omission by Plaintiff was the proximate cause of his injury but, by the same token, a careful reading of all the evidence will show that the liability of the Defendant because of its gross failure to perform its functions as a municipal corporation, in keeping reasonably safe the crosswalk at 15th and H Streets, N. W., Washington, D. C., where Plaintiff endeavored to cross thereon, from one street to another, was the proximate cause of his injury. This Court knows that the able counsel for the District of Columbia would have commented upon and emphasized and that any evidence showing contributory negligence of Plaintiff — if any — would have been brought to the Court's attention in most dramatic and emphatic ways possible. The only thing they endeavored to point to, an evidence of failure of duty by the plaintiff, is the fact established by his own statement that December 12, 1960 was a bad day, that he did not wear over-shoes that day but that he used the cross-walk with extreme caution, as shown by the following statements which remain, throughout the case, uncontradicted and/or unimpeached:

"Q. Now, Mr. McNeill, let me ask you this question. As you walked from the curb at 15th and H by the drugstore that you have described to these ladies and gentlemen and His Honor on to the sidewalk and before you fell, did you notice the condition physically of the crosswalk where you were walking?

A. I noticed it very carefully, and I moved with deliberation. I noticed it had been mashed down by traffic, automobile traffic and by pedestrian traffic, but I took care, I thought I could get across without any doubt; and I started out into the crosswalk; and, as I say, I stopped about eighteen feet, eight feet from the corner and attempted again to hail a cab." (J.A. 8)

"Q. Describe the surface of the crosswalk, Mr. McNeill.

A. It was very irregular, nothing harmonious about it, nothing level about it. It had been mashed and crushed and little mounds here and there. I notice that as I passed over it, because it was rough and I had to take careful steps." (J.A. 9)

"Q. What was the condition of the crosswalk as you looked at it?

A. Just as I have described it, there was two lanes of automobile traffic which had the snow beaten down; and in between where the automobile tires had not run, the snow was still there; and it that snow, there was evidence of people having walked across it; and it was all frozen." (J.A. 12)

Neglect of the street was so gross that the Defendant offered no evidence to contradict the above description of one of the busiest crossings in the City.

CONCLUSION

Contrary to the claims of the Appellant, the Appellee proved, through the testimony of two witnesses, that a dangerous condition existed at the intersection of Fifteenth and H Streets, N. W., over and beyond the mere natural slipperiness of ice and snow, and the District either knew of this condition, or through the many operations it claimed to have conducted on the day in question, should have known of this dangerous condition, evidence that was never rebutted in any way by the Appellant. Since nothing that the Appellee did or failed to do contributed to the proximate cause of his injury, there is no merit in the Appellant's conduct that this Court should remand the case to the District Court with directions to enter a judgment for the District as a matter of law.

On the contrary, since the District Court erred in permitting the introduction of testimony over objections of the Appellee, that inferred that the District had as a matter of fact conducted certain operations to rectify any dangerous condition at Fifteenth and H Streets, N. W. at the time in question, while having no knowledge of whether such operations had actually taken place, it is respectfully submitted that the case be remanded to the District Court with directions to set aside the verdict of the jury for the Appellants, and to grant the Appellee a new trial.

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Appellant,

v.

DISTRICT OF COLUMBIA,

Appellee.

On Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 21 1964

Nathan J. Paulson
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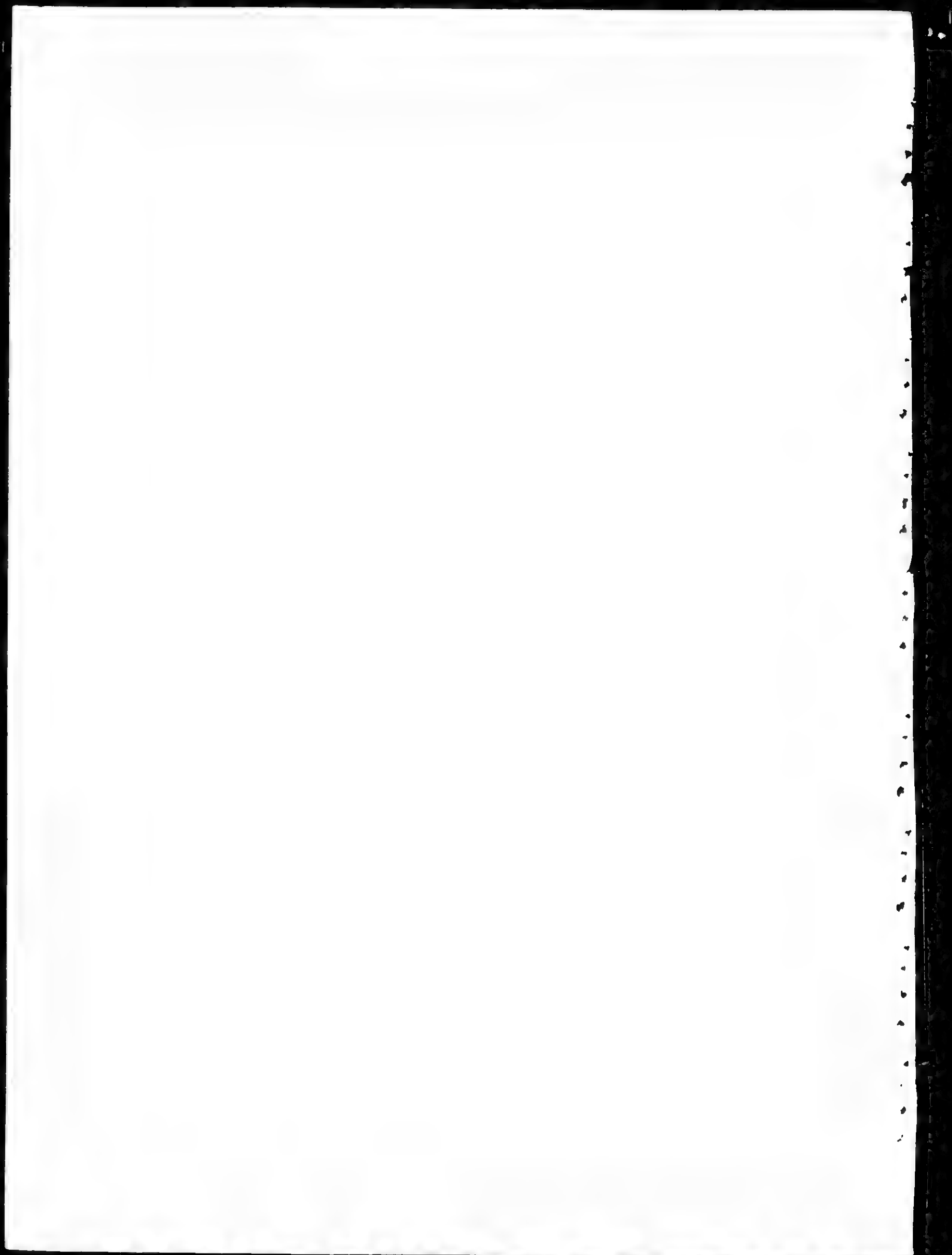
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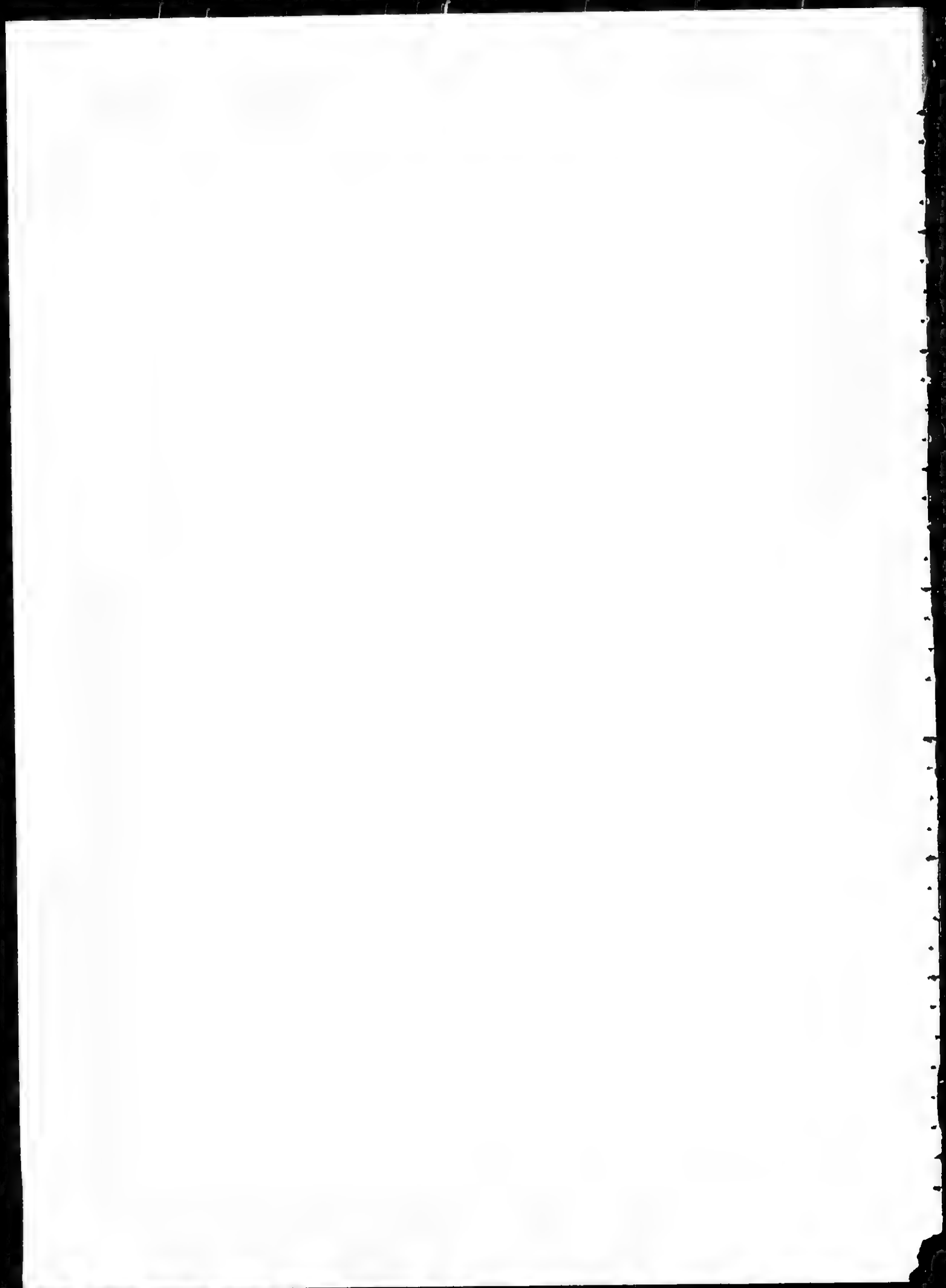
APPELLANT'S STATEMENT OF QUESTIONS PRESENTED

APPEAL NO. 18,570

(a) The question is whether an official of the District of Columbia Government should have been permitted to testify concerning a presumption on his part that the city had taken certain steps to eliminate a dangerous condition consisting of certain snow and ice formations in a cross walk at 15th and H Streets, NW, using as a basis for his testimony an eighty page snow plan and a snow report neither of which gave any indication of any work done by the District of Columbia, on the date and place in question.

(b) The question is whether the same city official should have been permitted to testify over objection that the records of his Department did not show that the city had received any complaints of a dangerous condition existing at 15th and H Streets, NW, on the date and place in question.

(c) The question is whether the Court should have charged the jury on contributory negligence, there being no evidence of negligence on part of the Plaintiff that could have been a proximate cause of the accident in question.



(ii)

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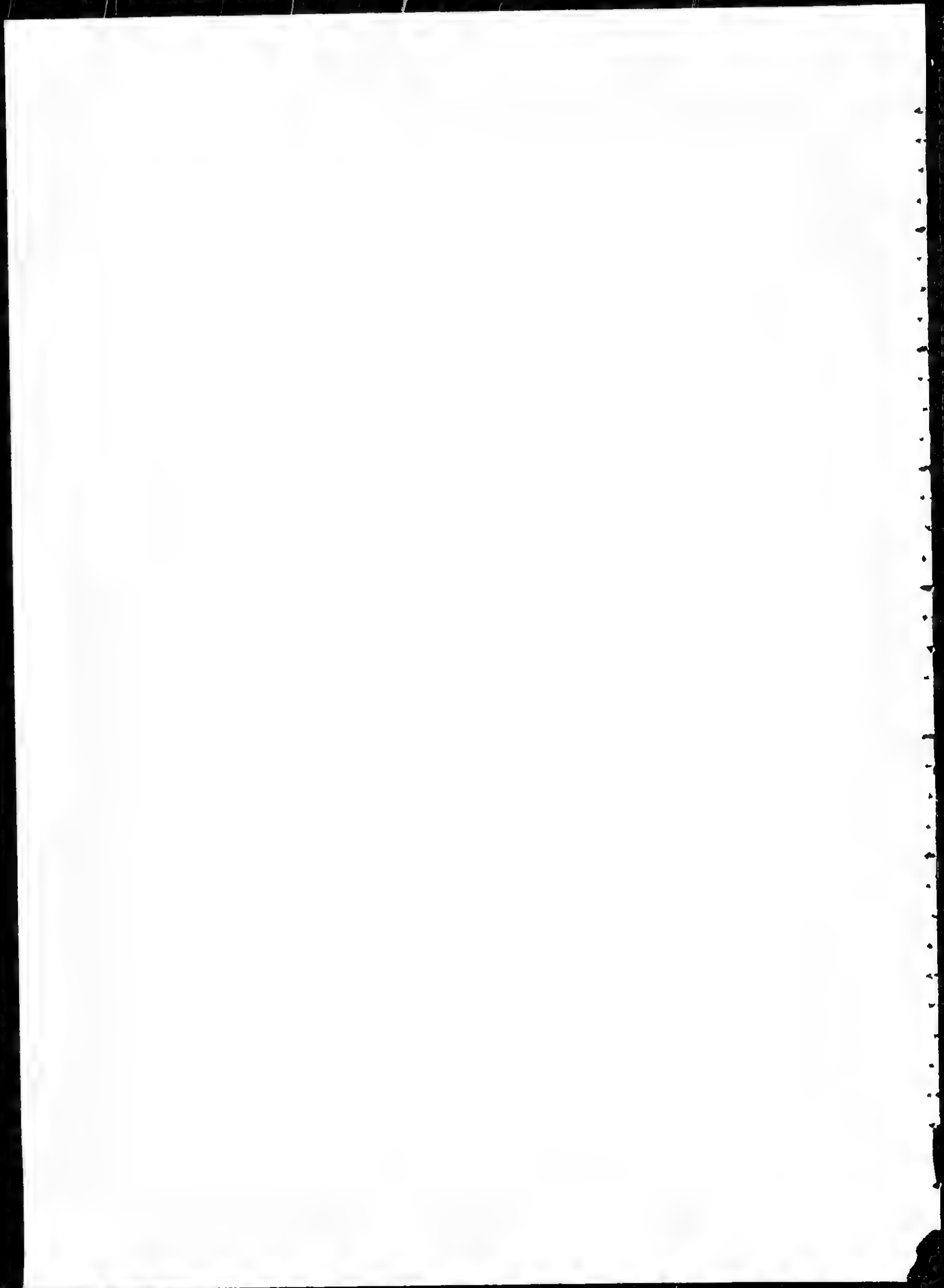
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,570

ROBERT H. McNEILL,

Appellant,

v.

DISTRICT OF COLUMBIA,

Appellee.

On Appeal from the United States District Court for
The District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from the United States District Court for the District of Columbia, hereinafter called the Court below, from a final verdict and judgment of December 5, 1963, against the plaintiff. Thereafter plaintiff below timely filed a motion for a new trial and that motion was denied and a motion to reconsider and for oral argument was likewise denied on January 14, 1964. A notice of appeal was duly filed (J.A. 33). This Court has jurisdiction under 28 U.S.C., Section 1291, to

review the proceedings and record herein. The Court below had jurisdiction under the District of Columbia Code, Title 11-306.

STATEMENT OF THE CASE

On December 12, 1961, the appellant, Mr. McNeill, fell in the north crosswalk at 15th and H Streets, NW, Washington, D. C., sustaining a broken hip. This fall occurred after a snowfall that began on December 11, 1961, and a snow and ice condition described by witnesses as being:

In all kinds of shapes and mounded here and depressed there. It was very irregular. (J.A. 9) (Tr. 9). * * * there was mounds of snow that had not been beaten down. It had footprints in it and it was very cold and frozen. * * * there was two lanes of automobile traffic which had the snow beaten down; and in between where the automobile tires had not run, the snow was still there; and in the snow, there was evidence of people having walked across it; and it was all frozen. (J.A. 12) (Tr. 70, 71)

The plaintiff's evidence (the appellant McNeill here), in addition to depicting a dangerous and hazardous condition in the forms and shapes that the snow and ice had been permitted to accumulate into, also showed that there was no physical indication that the District of Columbia had done anything to remove the snow and ice from the area of the crosswalk where Mr. McNeill fell or to render it less dangerous. This evidence was through the testimony of a member of the District of Columbia Bar, and a practicing attorney, who viewed the scene of the accident minutes after the fall.

Q. Did you see any evidence of any snow removal in that area?

A. At that time, I did not. (J.A. 12) (Tr. 72)

Q. I ask you now, Mr. Hill, as you stood there and looked out into the area that you have described to us, did you see any evidence of any sand or

ashes or any salt having been placed there in that area we are talking about?"

A. No, I did not. (J.A. 13) (Tr. 72)

Q. Did you see any men working around there digging or chopping or removing snow of any kind?

A. No, I did not. (J.A. 13) (Tr. 73)

The appellee, the District of Columbia Government, called one witness, the Deputy Superintendent of the Sanitation Division, who testified that when this accident occurred, the defendant had, in effect, a snow plan, and that operation under that plan, composed of some eighty (80) pages of material, were supposed to abate the street conditions caused by the snowfall. There was no testimony by anyone who had knowledge of whether the plan had been carried out or whether actual removal or rendering harmless steps were effected on the crosswalk in question. There was also testimony, over objections, by this witness that no complaints on any condition at Fifteenth and H Streets, Northwest, had been received by the District of Columbia Government, according to its records.

The case was submitted to the jury and a verdict was returned for the defendant, the District of Columbia.

STATEMENT OF POINTS

1. The ruling of the Court below was erroneous in that it permitted the official of the District of Columbia to testify that certain procedures for eliminating a hazardous or dangerous condition at the time and place in question had been carried out when such testimony was based on an eighty (80) page snow plan and a snow report which only outlined the proposed plan of operations for the whole city in the event of snowfall.

2. That the ruling of the Court below permitting the same city official to testify, over objection, that the records of his department did

not show complaints by anyone of a dangerous condition at Fifteenth and H Streets, Northwest, on the date in question, was error.

3. That the Court erred in instructing the jury as it did on the question of contributory negligence when there was no evidence of contributory negligence which could have been a proximate cause of the accident or have any probative value.

SUMMARY OF ARGUMENT

Point 1

In the trial of this cause, the appellant McNeill's evidence met the test set by this Court for proving liability against the District of Columbia Government for injuries sustained from a fall in snow and ice in a crosswalk.

The sole defense offered by the District of Columbia to rebut the plaintiff's evidence was the testimony of one City official that an eighty (80) page snow plan or program for any and all snow storms had been in effect on the day the injury occurred, and under this plan, certain procedures for clearing snow and ice or rendering it harmless from a certain section of the city, which included the crosswalk in question, would have been in effect. This testimony, although objected to many times, was constantly punctuated with statements that would lead one to believe that this was a report of recorded performance, rather than a plan by which certain work was supposed to be done. There was no testimony by anyone with knowledge of whether the outlined procedures had been carried out, and to what work, if any, had been done on the particular crosswalk. The jury was therefore given an unwarranted and erroneous impression and presumption that the defendant had proved certain facts, which it had not.

Point 2

The same city official referred to in Point 1 was permitted to testify for the District of Columbia, over objection, that the records of his Department did not show there had been received complaints of any type of the condition at the intersection in question. This testimony cast an unwarranted prejudicial inference that because no report had been received or recorded of a dangerous condition at Fifteenth and H Streets, N.W., that none, in fact, existed.

Point 3

It was error on the part of the Court in his charge to the jury to repeatedly refer to the doctrine of contributory negligence for the reason that the record shows that there was no testimony of any negligent acts on the part of the plaintiff which could be properly considered to be a proximate cause of the fall incurred.

ARGUMENT

Point 1

The plaintiff's evidence, having shown that a dangerous condition existed at the site of the fall, and had caused the fall, and that the District of Columbia had done nothing to rectify the condition, placed the District of Columbia in the position of having to rebut such evidence. *Smith v. District of Columbia*, 89 U.S. App. D.C. 7, 189 F.2d 671.

To do this, they called only one witness, the Deputy Superintendent of the Sanitation Division of the District of Columbia Government. The nature and scope of this official's testimony was limited strictly to one plan of defense to the plaintiff's case. That plan was to show that the District of Columbia had a snow program, detailed in an eighty (80) page booklet, and that under this program, in and after any snow storm, certain snow and ice removal procedures and sanding and salting operations would go into effect. From the very outset of this witness' testimony, it

was obvious that he was going to be talking about a general plan used by the District of Columbia to cover just what the District tried to do to cope with snow removal problems in the city. (J.A. 18) (Tr. 188) This was initially objected to on the grounds that what the city was supposed to do under a plan of operation for snow removal was in no way material unless the witness had personal knowledge that certain steps had actually been taken and that certain work had actually been performed at Fifteenth and H Streets, Northwest. The nature of the objection constantly made was best stated on page 196 of the Transcript:

Mr. McDonald: I hate to interrupt, Your Honor, but we are delving into a plan. I think the witness must be more specific. A plan is one thing and action and work as a result are different. (J.A. 22) (Tr. 196).

The Court's feeling about the use of the eighty (80) page plan can best be understood by the observation made on page 190 of the Transcript:

The Court: I understand that there were preliminary questions on the general snow plan in operation and effect. Now, what the jury is concerned with and counsel and the Court, is *what* the plan was, and what the District did insofar as this particular snowstorm is concerned. What did they do to make the streets or crosswalks safe for pedestrians, and things like that. (Tr. 190)

And on page 195 and 196:

The Court: I think, if counsel can direct the witness' attention to what the plan was with respect to Fifteenth and H Street at about the time of the accident in this case.

The Court: That is all we are interested in, do you understand? The plan that was in operation and what was done at Fifteenth and H Street, Northwest. That is what we want to find out. (J.A. 21) (Tr. 195 & 196)

and on page 196 and 197 of the Transcript:

The Court: Well, I don't know whether the witness can testify as to what was done at that particular point on that, unless he has personal knowledge.

All he can testify is, as I understand it, what is reflected in the records he has. That is correct, isn't it? (J.A. 22) (Tr. 196 and 197)

Several matters should be clarified at this point.

First, the plaintiff did not object to a so-called snow report which merely showed the number of vehicles and the labor force used in the particular snowfall. The constant and consistent objection was the testimony that the general snow plan meant, for a fact, that these men and equipment were used in a certain way and accomplished a certain objective, namely the clearing of a snow and ice condition at Fifteenth and H Streets, Northwest. The extent which the District went to leave the impression that the witness knew that certain work was done is best illustrated by the testimony.

Q. Do you have any records there, sir, that reflect the number of vehicles that were used in connection with the plowing operation on Fifteenth Street?

A. On Fifteenth Street, the width of that street would normally carry two plows.

Q. How about H Street?

A. H Street, the width of that street would normally carry two plows. (J.A. 25) (Tr. 203)

Time after time, the witness used the expression, "would be" or "would normally" to describe what he believed had been accomplished. (J.A. 19, 22-25) (Tr. 191, 198, 200, 203)

Secondly, it should be understood that the witness had no records kept in the regular course of business, or otherwise, indicating that any snow and ice removal or sanding or salting operation had actually been performed at Fifteenth and H Streets, Northwest. The eighty (80) page snow program and the two page snow report, the latter being a part of this record (J.A. 18) is all that he had.

Third, the witness had no personal knowledge of what, if anything, had been done by the city at Fifteenth and H Streets, Northwest.

Q. Now, do you have any personal knowledge, from your study of this case, Mr. Roeder, that at any time from the time those plows started to work on Sunday, that they ever plowed Fifteenth Street across H Street, and the northeast crosswalk at Fifteenth and H Street? Do you have any personal knowledge of that?

A. Only from my reports. * * * * (J.A. 30) (Tr. 222)

But the witness in fact did not have reports that reflected any work performed at Fifteenth and H Streets, Northwest, as was made clear on further examination.

Q. Now, you are telling me what somebody would have done, but I am asking you, Mr. Roeder, do you have anything there that would tell His Honor and these ladies and gentlemen of the jury, in those records, that anyone ever called or put anything into the record to show that the crosswalks at Fifteenth and H were ever cleared or even sanded on the 11th or 12th of December, 1960?

A. No, sir. We do not keep a record of every intersection that is cleared, or every intersection or traffic light that is sanded. It would be a physical impossibility, I think. (J.A. 30) (Tr. 225)

Q. Do you have any actual knowledge, Mr. Roeder, of the intersection of Fifteenth and H Street on December the 11th or December the 12th, 1960?

A. No, sir, I am afraid I would not have a recollection. (J.A. 25) (Tr. 205)

And on page 233 of the Transcript:

A. We probably covered Fifteenth and H, but I have no personal knowledge of it at that time. (J.A. 31) (Tr. 233)

Fourth, the District had employees who would have known what was done regarding cleaning Fifteenth and H Streets, if anything, as the defendants' agents knew of this accident shortly after it happened and at a time when the foreman for the area would have remembered this snow-fall, but these people were not called to testify by the District.

- A. The foreman in the area would be checking as far as their doing the crosswalks are concerned * * * *.
(J.A. 30) (Tr. 225)

The inescapable conclusion from these observations is that the jury was furnished a plan of action to be considered as an accomplished ~~ment~~ act to overcome the plaintiff's evidence that a dangerous condition existed at Fifteenth and H Streets, on the date and time in question, and defendant had done nothing to rectify it.

That the hearsay rule applies to writings was made clear by this Court in *Communist Party of U. S. v. Subversive Activities Control Bd.*, 102 U.S. App. D.C. 395, 254 F.2d 314.

The logic for excluding such testimony as was permitted in this case by Mr. Roeder is made abundantly clear in *Universal Airline v. Eastern Air Lines*, 88 U.S. App. D.C. 219, 188 F.2d 993, when this Court said at page 226:

The reports of *ex parte* hearings and investigations are generally excluded, not because of danger of "usurpation of the jury's function" but because the evidence is improper and irrelevant, even if the hearing is before a judge sitting without a jury. Such reports, *or testimony concerning such reports* (italics ours) would be hearsay based upon hearsay. The rights of parties are to be determined by testimony adduced at the trial according to the rules of examination and cross-examination.

And note what is said in *Vanadium Corp. of America v. Fidelity and Deposit Co. of Maryland, et al.* (2 CA 1947), 159 F.2d 105 at 109:

But as Wigmore points out, the "official statements" exception to the rule excluding hearsay is "good common law" though he adds, "the numerous petty statutory rules have made the Bar suppose they must always find a statute." 5 Wigmore on Evidence, 3rd Ed. 1940 sec. 1638a. Actually this exception is recognized because of necessity or inconvenience which would result from always requiring the testimony of the official in person to the facts he has recorded; and his official duty supports the require-

ment that there be found some circumstantial probability of trustworthiness. 2d. sec 1630-1633
Richardson on Evidence, 2d Ed. sec 591.

But statutes merely provide for the method of proof of the records and do not settle their admissibility in a particular case, as proving or tending to prove the truth of the matters stated in them. Since however, they are a substitute for the appearance of the public official himself a natural limitation, so far as they deal with *observed facts is that they must concern matters to which he could have testified in person.* (italics ours).

To the same effect is *Hubsch v. United States* (5 CA 1949), 174 F.2d 7.

Point 2

The Deputy Superintendent of the Sanitation Division was permitted to testify over objection that the records of his department contained no reference to any complaints concerning the crosswalk at Fifteenth and H Street, Northwest, on December 12, 1961.

Q. Did you find in that record, sir, any specific complaints concerning the intersection of Fifteenth and H Streets, Northwest?

* * *

The Witness: I could not find any requests or complaints for that particular intersection. (J.A.26)
 (Tr. 206, 207)

The Court best summed up the appellant's position on this question in this manner:

The Court: Well, suppose that there were no complaints made, what would that prove? What is the probative value of that? That this man wasn't hurt? (J.A. 26)

The District of Columbia, however, contended that testimony was admissible on the question of notice of the condition to the defendant. But there could be no question of notice in this case, i.e. whether the District had received notice. This condition existed, according to the

testimony, at one of the very busy intersections of the city when the city had out a large force to cope with just such dangerous conditions if they occurred. They should have known of such condition and if they did not it was a further indication of negligence and a failure they could not charge to the plaintiff.

Hence, the admission of this testimony had no probative value and served only the purpose of placing before the jury the unwarranted and unfair inference that since the record did not show that anyone had complained to the District of a dangerous condition at the particular intersection that no such condition existed.

Point 3

It was error on the part of the court to repeatedly refer to the doctrine of contributory negligence, the error being based upon the following points:

The law requires in such cases as this that the plaintiff, at all times, be required to use reasonable care in crossing the crosswalk in question, at Fifteenth and H Streets, N.W., and the defendant must keep the area walks in good, safe condition. We urge that this rule is practically universal through the various states of the United States.

In this case the evidence shows there *was no contributory negligence*, hence the charge of the court on that subject could have been treated by the jury as a suggestion or intimation that there was some evidence in the case, upon which the jury might find that the plaintiff had been guilty of contributory negligence in his use of the crosswalk at Fifteenth and H Streets, N. W., Washington, D. C., December 12, 1961. Mr. McNeill's testimony was, in all respects, direct, definite and conclusive as to his use of the crosswalk as the following testimony indicates:

- A. I didn't get one standing on the curb of the street, 15th and H street corner. I didn't get one. They passed by either filled or indifferent, apparently. So after I had stayed there ten or fifteen minutes attempting to get a cab, I decided I would cross the street on the crosswalk and perhaps I would have better luck at the Shoreham corner. I started to cross. I walked about eight to ten feet from the curb of the sidewalk, and there I attempted to hail a cab going north, which was my direction home. I still failed to get a cab; and in standing there, I noticed looking back over the route I had come a streetcar approaching on H Street; and I made up my mind, well, I could get that cab and transfer at 18th and Columbia Road. (J.A. 8) (Tr. 7-8)
- Q. Now, Mr. McNeill, let me ask you this question. As you walked from the curb at Fifteenth and H by the drugstore that you have described to these ladies and gentlemen and His Honor on to the sidewalk and before you fell, did you notice the condition physically of the crosswalk where you were walking?
- A. I noticed it very carefully, and I moved with deliberation. I noticed it had been mashed down by traffic, automobile traffic and by pedestrian traffic, but I took care, I thought I could get across without any doubt; and I started out into the crosswalk; and, as I say, I stopped about eighteen feet, eight feet from the corner and attempted again to hail a cab. (J.A. 8) (Tr. 8)
- * * *
- A. The crosswalk showed evidence of much traffic on foot and by automobile, and it was in all kinds of shapes and mounded here and depressed there; and I noticed all that. Of course, I wasn't looking for trouble that day, but I had to notice it in order to get by with safety. (J.A. 9) (Tr. 9)
- * * *
- Q. Describe the surface of the crosswalk, Mr. McNeill.
- A. It was very irregular, nothing harmonious about it, nothing level about it. It had been mashed and crushed and little mounds here and there. I noticed that as I passed over it, because it was rough and I had to take careful steps.

Q. Now, when you fell, do you have a recollection today of what happened after you fell?

A. My best recollection is this: As I turned to retrace my steps to catch the streetcar, my left foot slipped out from under me; and I went down suddenly and hard and fast; and as I fell, my impression was at the time that I was slipping on ice under the snow. In any event, I went down so suddenly that I was very much shocked; and two men came to get me out. I don't know either of them. I have tried to trace them ever since it happened. (J.A. 9) (Tr. 9, 10)

The condition of the crosswalk was described in detail by the plaintiff and by the witness Vivian Hill. Their description shows that, as observed distinctly by both the condition of the street was such as to have been the *sole proximate cause* of plaintiff's injury and that nothing he did should have been submitted to the jury as a basis for the finding of contributory negligence, which would be unsupported by any substantial evidence.

The defense may claim that there was no evidence offered showing contributory negligence by plaintiff which warranted a charge to the jury that, under the evidence in this case, they could consider the question of whether or not the plaintiff was guilty of contributory negligence. Such conclusion is not warranted under the rules of evidence which should have been applied.

In weighing the plaintiff's conduct a number of factors must be borne in mind in light of a claim of contributory negligence. The plaintiff was 83 years of age at the time of the trial according to his testimony. The municipality in maintaining its streets must keep in mind they are being used by the aged as well as others.

The law recognizes and makes allowances for results of a person's aging:

A person whose senses are blunted and mental facilities impaired by old age is not guilty of contributory negligence where his failure to use that

degree of care which an ordinary prudent person under the same or similar circumstances is due to such disability. (Vol. 65 CJS, Sec. 140, p. 782)

Weighed in this light nothing that plaintiff did could have probative value on the question of contributory negligence, i.e. his acts did not proximately cause the accident.

In order to be guilty of contributory negligence, such negligence must be a proximate cause of the injury.

It is not sufficient that the negligence for which plaintiff is responsible contributed to cause the injury complained of. In order to be contributory negligence, such negligence must be a proximate cause of the injury * * * in the same sense in which defendants' negligent act or omission must have been proximate to the injury in order to give a right of action. (65 CJS Sec. 129, p. 744. *Wardel v. McKee*, 171 Md. 251)

From the above generally accepted principles of law as to cases of negligence by defendant and its claim of contributory negligence, we submit that the issue of contributory negligence, charged against plaintiff, could only be permitted if there existed some probative evidence, of a substantial character, as to one or more occurrences or instances of negligence showing an actual failure by plaintiff to use due and reasonable care himself and that such failure contributed to and was the proximate cause of his injury. We maintain that no such showing was made and that plaintiff showed, by uncontradicted testimony, that he used due and reasonable care when entering the crosswalk on Fifteenth Street, on the intersection of Fifteenth and H Streets, N. W., Washington, D. C., and that his fall on said crosswalk and the injuries he suffered therefrom were caused by the neglect and failure of defendant to perform its function as a municipal corporation by maintaining the said crosswalk in a reasonably safe condition for pedestrian use and that such failure was the proximate cause of plaintiff's serious and permanent injuries. We urge that the failure of the defendant to do or have done, on said crosswalk, the things necessary to make the crosswalk reasonably safe, was

a violation of its unquestioned duty to plaintiff and others so long as they acted and used said crosswalk with reasonable care. In such cases the proximate cause of plaintiff's injuries was the failure upon defendant as matter of law.

CONCLUSION

The evidence submitted by the plaintiff showing first the dangerous condition that existed at the site of his fall and also showing the failure of the defendant's agents to rectify said condition and finally showing the fall was proximately and solely caused thereby entitled him to a verdict.

The testimony of a city official using an operation plan for snow and ice removal for the city of Washington and a snow report that listed men and equipment used in a certain snow storm and thereby surmising what had been done in a particular crosswalk was hearsay on top of hearsay and should never have been admitted over objection. This testimony as well as that of the same witness indicating the District of Columbia had not received any reports of a dangerous condition at the place in question was irrelevant and prejudicial to plaintiff's case.

The only evidence on the plaintiff's own conduct and manner of crossing the street showed that he used extreme caution in walking over the dangerous surface and that nothing he did contributed to the fall. Therefore, the doctrine of contributory negligence should not have been injected into the trial. The fact that appellant's own counsel did not take exception to the charge of the Court on contributory negligence should not allow a verdict to stand which is clearly against the weight of the evidence.

Respectfully submitted,
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JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,570

ROBERT H. McNEILL,

Appellant

v.

DISTRICT OF COLUMBIA

Appellee

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No. 18,570

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Appellant

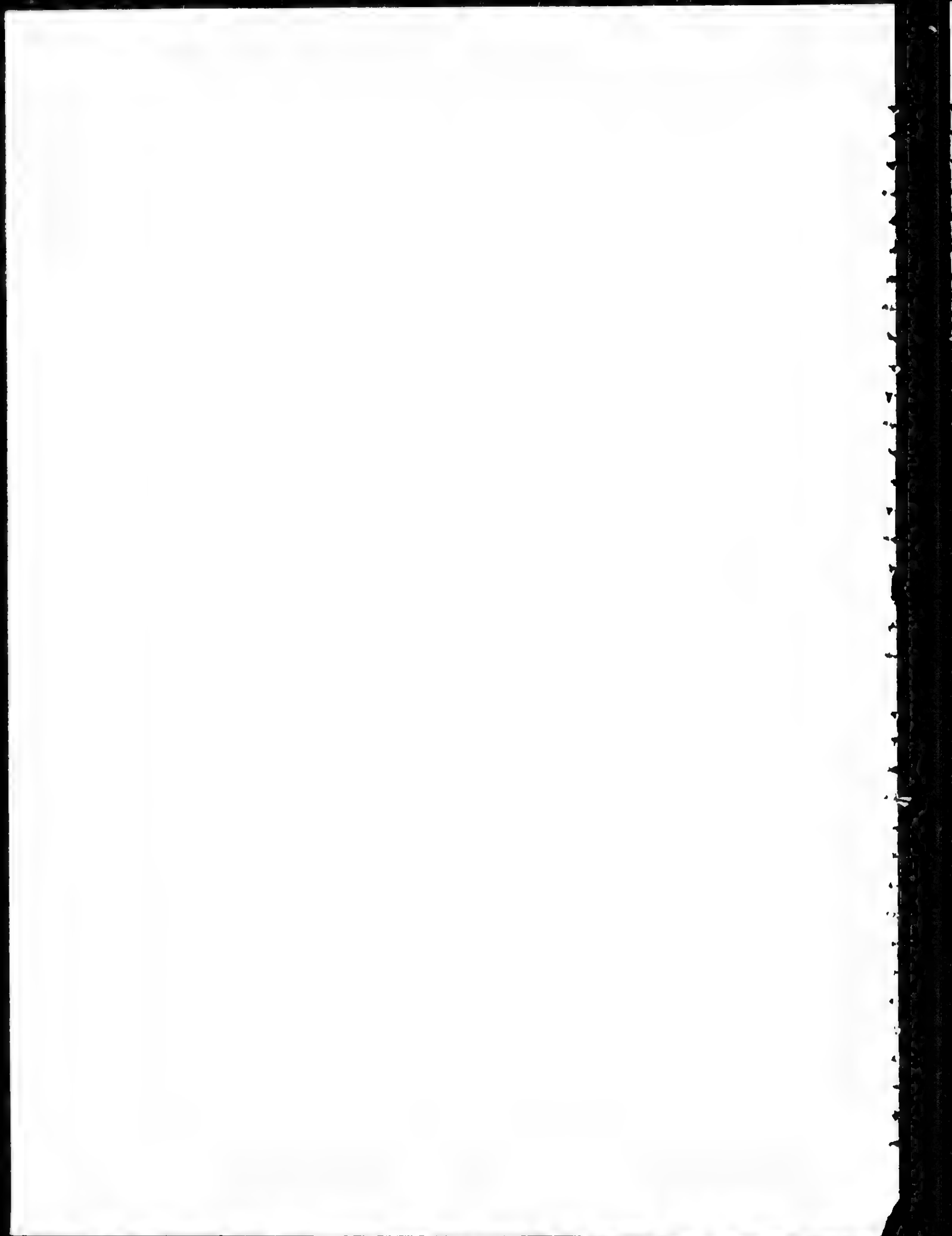
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DISTRICT OF COLUMBIA

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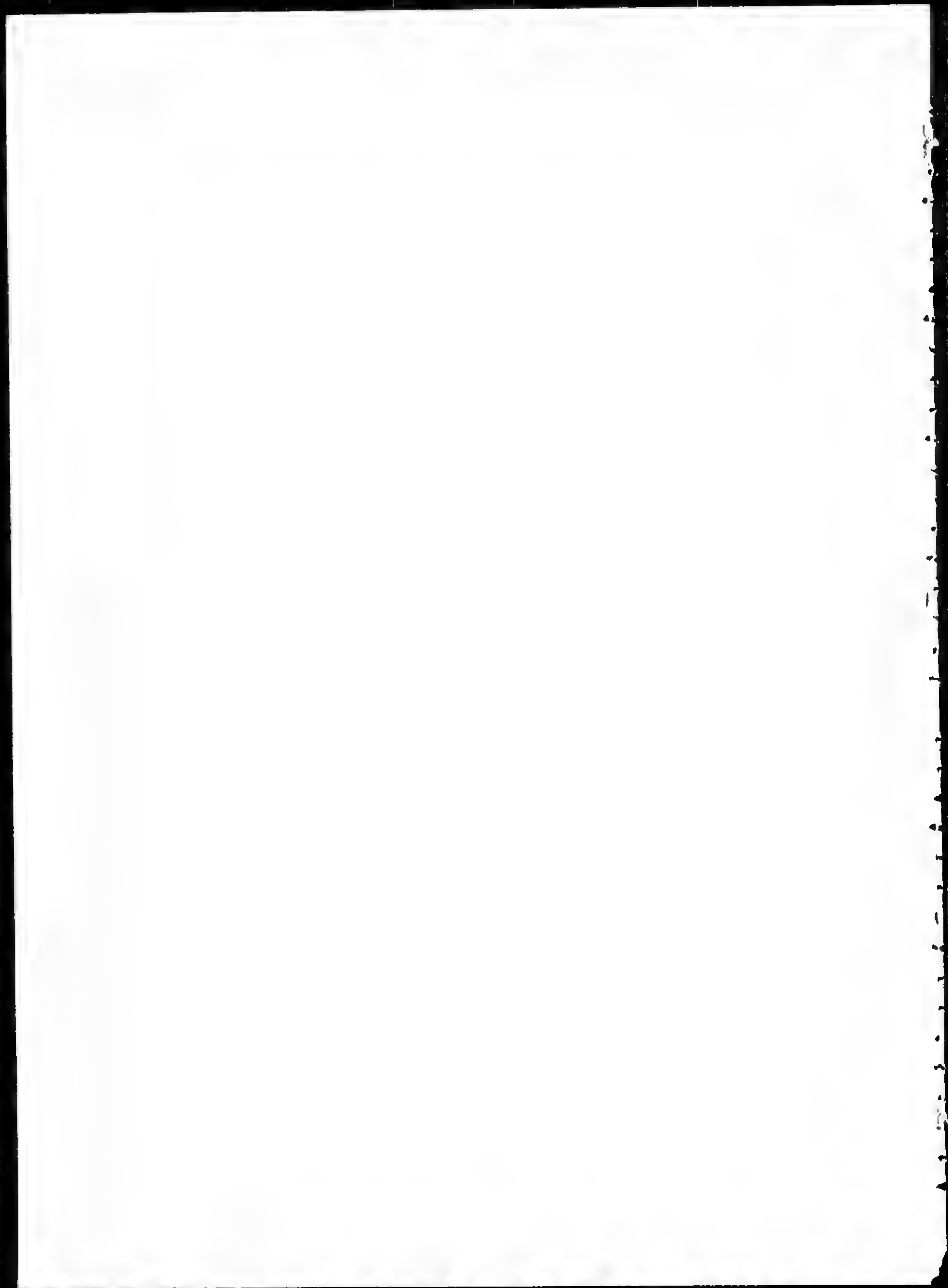
JOINT APPENDIX



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JOINT APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ROBERT H. McNEILL
3212 Garfield Street
Washington, D. C.

Plaintiff

vs.

THE DISTRICT OF COLUMBIA,
A Municipal Corporation
The District Building
Washington, D. C.

Defendant

Civil Action No. 773-'62

RELEVANT DOCKET ENTRIES

Date

Proceedings

1962

Mar. 8	Complaint, appearance, Jury Demand, filed.
Mar. 8	Summons, copies (1) and copies (1) of Complaint issued. Served 3-9-62.
Mar. 28	Answer of deft to complaint; c/m 3/28/62; appearance of Chester H. Gray, John A. Earnest, George H. Clark & Robert R. Redmon. filed.
Mar. 28	Calendared (AC/N) (N)
May 8	Deposition of pltf by deft. \$35.20. filed.
Oct. 15	Called. Assistant Pretrial Examiner.

1963

Feb. 6	Certificate of Readiness of pltf; c/m 2-6-63. filed.
Apr. 18	Motion of pltf to advance cause for trial; P & A; c/m 4-17- 63; attachments (2); MC 4-18-63. filed.
Apr. 24	Opposition of deft to pltf's motion to advance; c/m 4-24-63. filed.

<u>Date</u>	<u>Proceedings</u>
Sep 11	Motion of pltf. to advance cause for trial granted. (N) McGuire, C.J. (Fiat) AC/N
Sep 27	Pretrial Proceedings (9-26-63) Asst. Pretrial Examiner.
Dec. 2	Jury sworn; two alternate jurors sworn; trial begun and respited to Dec. 3, 1963. Sirica, J.
Dec. 3	Trial resumed; same jury; same alternates; respited to Dec. 4, 1963. Sirica, J.
Dec. 4	Trial resumed; same jury; same alternates; respited to Dec. 5, 1963. Sirica, J.
Dec. 5	Trial resumed; same jury; same alternate jurors; alternate jurors discharged; verdict for deft. Sirica J.
Dec. 5	Verdict and judgment for deft. (N) Sirica, J.
Dec. 5	Pltf's and deft's prayers. filed.
Dec. 5	All exhibits returned to counsel for pltf and deft.
Dec. 11	Deposition of Vivian O. Hill. filed.
Dec. 16	Motion of pltf to set aside jury verdict and to grant new trial; c/m 12-16-63; P & A; M.C. 12-16-63. filed.
Dec. 18	Opposition of deft to motion for new trial; c/m 12-18-63. filed.
<u>1964</u>	
Jan. 6	Order overruling motion of pltf to set aside jury verdict and to grant a new trial. (N) Sirica, J.
Jan. 14	Motion of pltf to reconsider motion to set aside jury verdict and for oral argument; c/m 1-14-63. M.C. 1-14-64. filed.
Jan. 24	Order denying motion to reconsider motion to set aside jury verdict and for oral argument. (N) Sirica, J.
Jan. 30	Notice of Appeal by pltf; copy mailed to George S. Clark, Asst. Corporation Counsel; deposit by McDonald, \$5.00. filed.
Feb. 5	Notice of appeal of deft. (Copy mailed to Wesley McDonald). filed.
Mar. 6	Order extending time to file record on appeal to April 10, 1964. (N) Keech, J.
Mar. 12	Motion of deft. for extension of time within which to file record on appeal; c/m 3-12-64. filed.
Mar. 16	Consent Order extending time to file record on appeal to April 10, 1964. (N) Keech, J.

<u>Date</u>	<u>Proceedings</u>
Apr 8	Consent order extending time to file record on appeal & cross-appeal until April 22, 1964. (N) Curran, J.
Apr 21	Exhibits 1 & 2 of deft. filed.

[Filed Mar. 8, 1962]

COMPLAINT FOR DAMAGES - PERSONAL INJURIES

Comes now the plaintiff and represents to this Honorable Court as follows:

1. That this Court has jurisdiction of this cause by virtue of the provisions of Title 11, Section 208, and Title 12, Section 208 of the Code of the District of Columbia, 1951 Edition.
2. That the plaintiff is a citizen of the United States, a resident of the District of Columbia, and brings this suit in his own right.
3. That the defendant is a Municipal Corporation and is sued pursuant to the provisions of Title 12, Section 208, District of Columbia Code, 1951 Edition, the plaintiff having complied with the prerequisites of that statute now properly brings this action.
4. That on or about December 12, 1960, the agents, servants, employees and those charged specifically with the responsibility of taking certain action to prevent the accumulation of snow and ice and the continuance of its existence on the public streets of the District of Columbia at the intersection of 15th and H Streets, N.W., Washington, D.C., and to make the same safe for pedestrians to walk on, negligently and carelessly permitted snow and ice to remain thereon in such a negligent manner and in violation of law and requirements as to be hazardous and dangerous to said pedestrians.
5. As a result of the aforesaid negligent and careless conduct of the agents, servants and employees of the District of Columbia Government, the plaintiff, while standing in a cross-walk at said intersection

and as he was crossing that part of said street to the west-bound streetcar platform from the northeast corner of said intersection preparatory to boarding a streetcar, the treacherous condition of snow and ice on that part of the street aforescribed caused the plaintiff to fall and badly crush his left hip.

6. That as a result of the aforementioned fall and resultant injury all caused by the negligent omission of the defendant's agents, servants or employees, the plaintiff has been forced to secure extensive hospitalization and medical treatment, including an operation known as a prosthesis, and the plaintiff is still receiving and will in the future receive extensive medical treatment for residuals of the crushed hip.

7. That as a result of the injury aforescribed, the plaintiff suffered much pain and mental and nervous anguish and strain, and is today permanently injured and crippled.

8. That the plaintiff, as a result of the injury aforementioned, has been forced to expend large sums for medical care and treatment and will in the future be forced to expend large sums for this reason.

9. That the plaintiff, as a further result of his injury on December 12, 1960, has lost the emoluments of his profession, being totally unable to follow that profession for a long period of time, and thereafter, and presently, and in the future his ability to work is and will be greatly impaired.

WHEREFORE, these premises considered, the plaintiff demands damages of the defendant in the sum of One Hundred Thousand Dollars plus costs of this action.

/s/ Robert H. McNeill
Robert H. McNeill, Plaintiff

Plaintiff demands trial by jury.

/s/ W. E. McDonald
Attorney for Plaintiff

/s/ Wesley E. McDonald
/s/ Thomas A. Farrell
Attorneys for Plaintiff

* * *

[Filed March 28, 1962]

ANSWER OF THE DISTRICT OF COLUMBIA

First Defense

The complaint fails to state a claim against the District of Columbia upon which relief can be granted.

Second Defense

1. Defendant admits the allegations contained in paragraph numbered 1 of the complaint.

2. Defendant says it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered 2 of the complaint.

3. The District of Columbia admits that it is a municipal corporation. The remaining allegations in paragraph numbered 3 are conclusions which it is not required to answer. However, if answer be required, said allegations are denied.

4. Defendant denies the allegations contained in paragraph numbered 4 of the complaint.

5. In answer to paragraph numbered 5 of the complaint, the defendant denies the allegations of negligence contained therein and says that it is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning the manner in which the plaintiff fell.

6, 7, 8 and 9. The defendant denies the allegations contained in paragraphs numbered 6, 7, 8 and 9 of the complaint.

Third Defense

Defendant says that if plaintiff, Robert H. McNeill, was injured and damaged, as alleged, said injury and damage resulted from his sole or contributory negligence.

Fourth Defense

Any injury or damage suffered by the plaintiff was occasioned by the inherent qualities of the precipitation encountered.

/s/ Chester H. Gray
CHESTER H. GRAY
Corporation Counsel, D.C.

/s/ John A. Earnest
JOHN A. EARNEST
Assistant Corporation Counsel, D.C.

/s/ George H. Clark
GEORGE H. CLARK
Assistant Corporation Counsel, D.C.

/s/ Robert R. Redmon
ROBERT R. REDMON
Assistant Corporation Counsel, D.C.
Attorneys for Defendant
District Building
Washington 4, D. C.

[Certificate of Service]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1

Washington, D. C.,

Monday, December 2, 1963.

The above-entitled cause came on for trial before HONORABLE JOHN J. SIRICA, United States District Judge, and a jury, at 10:00 a.m.

* * * * *

3

ROBERT H. McNEILL

the plaintiff, was called as a witness in his own behalf and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. McDONALD:

Q. * * * And will you tell us now initially, please, sir, your full name and tell us where you live? A. My name is Robert H. McNeill. I live at 3212 Garfield Street, Northwest, Washington, D. C., and I have lived in that home for about forty years.

* * * * *

4

Q. Now, directing your attention to December of 1960, how old were you in that year? A. I think I was 83 the year that it happened.

Q. All right, sir. Now, do you recall whether or not you worked or came to your office on December 12th, 1960? A. I came to town that morning. I don't remember the hour, but I was in my office around ten o'clock on December 12th, 1960.

* * * * *

Q. Now, Mr. McNeill, what was the condition of the weather that morning as you came to work? A. It was a very bad morning, bad day, continued bad as far as I recall during the whole day.

* * * * *

5

Q. And about that time, did you leave to go home? A. Along about two-thirty to three -- I can't be exact because I didn't look at my watch, between two-thirty and three. There was very little business going on anywhere around that hour. I decided to go home. So I left my office and

went down on the sidewalk and tried to get a cab but couldn't get one. They all hurried by.

Q. Let me ask you this, Mr. McNeill. Did you go down 15th street toward H, or which way did you go when you left your office? A. I went south towards the Southern Building corner, and I got to the Southern Building corner and continued to hail cabs for a few minutes, had no success. Everybody wanted a cab, too, it seemed like. There were quite
6 a number on the corner standing like I did waiting for a cab, and crossing the street going to the Shoreham Building.

* * * * *

7 Q. Now, you say you were there trying to hail a cab. I ask you, were you successful in getting a cab? A. I didn't get one standing on the curb of the street, 15th and H Street corner. I didn't get one. They passed by either filled or indifferent, apparently. So after I had stayed there ten or fifteen minutes attempting to get a cab, I decided I would cross the street on the crosswalk and perhaps I would have better luck at the Shoreham corner. I started to cross. I walked about eight to ten feet from the curb of the sidewalk, and there I attempted to hail a cab going north, which was my direction home. I still failed to get a cab; and
8 in standing there, I noticed looking back over the route I had come a street-car approaching on H Street; and I made up my mind, well, I could get that cab and transfer at 18th and Columbia Road.

* * * * *

Q. Now, Mr. McNeill, let me ask you this question. As you walked from the curb at 15th and H by the drugstore that you have described to these ladies and gentlemen and His Honor on to the sidewalk and before you fell, did you notice the condition physically of the crosswalk where you were walking? A. I noticed it very carefully, and I moved with deliberation. I noticed it had been mashed down by traffic, automobile traffic and by pedestrian traffic, but I took care, I thought I could get across without any doubt; and I started out into the crosswalk; and, as I say, I stopped about eighteen feet, eight feet from the corner and attempted again to hail a cab.

Q. Well, now -- A. I again failed to get one. I turned around and
9 saw the streetcar coming.

Q. Mr. McNeill, I asked you, did you notice the condition of the sidewalk. You have told us it had been trampled. A. The sidewalk --

Q. I don't mean the sidewalk, the crosswalk. A. The crosswalk showed evidence of much traffic on foot and by automobile, and it was in all kinds of shapes and mounded here and depressed there; and I noticed all that. Of course, I wasn't looking for trouble that day, but I had to notice it in order to get by with safety.

* * * * *

Q. Describe the surface of the crosswalk, Mr. McNeill. A. It was very irregular, nothing harmonious about it, nothing level about it. It had been mashed and crushed and little mounds here and there. I noticed that as I passed over it, because it was rough and I had to take
10 careful steps.

Q. Now, when you fell, do you have a recollection today of what happened after you fell? A. My best recollection is this: As I turned to retrace my steps to catch the streetcar, my left foot slipped out from under me; and I went down suddenly and hard and fast; and as I fell, my impression was at the time that I was slipping on ice under the snow. In any event, I went down so suddenly that I was very much shocked; and two men came to get me out. I don't know either of them. I have tried to trace them ever since it happened; but they took me by the arms and I said, "Gentlemen, be careful, I don't know what has happened to me." And they led me, almost carried me into the Southern Drugstore where I had a pretty good friend, Mr. McCormick, the druggist; and he had me seated on the stool in the main body of the drugstore; and after I sat there a few minutes, he called up my family physician, Dr. William M. Ballinger; and I get that information not by hearing him but from his conversation. And then about fifteen minutes after I came into the drugstore, an ambulance came; and I was loaded on to the ambulance by the people in the drugstore and the attendants on the ambulance and went to Doctors Hospital.

* * * * *

23 Q. All right, sir. Now, I think that I have neglected to ask you earlier, you talked about a crosswalk at 15th and H Street where you fell earlier this morning in your testimony. Will you tell the jury which way the crosswalk ran that you fell on? A. East and west.

24 Q. And from what point by way of identification? A. Well, I entered the crosswalk from the northeast corner of H and 15th.

Q. And the crosswalk ran in what direction? A. West.

Q. And will you tell us further by way of identification what is on the other corner, the northwest corner? A. The Shoreham Building is on the other side.

Q. The Shoreham Building. Now, is that the crosswalk that you fell in? A. That is right.

* * * * *

51 CROSS EXAMINATION

BY MR. REDMON:

58 Q. Now, in the course of Sunday afternoon and evening, Mr. McNeill, did you have any occasion to watch television or listen to the radio? A. Well, I know it was a bad Sunday afternoon and Sunday night, bad weather, if that is what you mean, and had been snowing.

* * * * *

59 Q. Do you recall having any conversation with Mrs. McNeill with respect to the weather on Monday morning? A. Yes, I do. Mrs. McNeill said, "Don't go, because there won't be anybody else downtown." I said, "Well, I have got some things I must look after; I have got to go for a while." So I went.

Q. Didn't Mrs. McNeill also tell you that it was such a bad day that she begged you not to go? A. She is a very cautious person; and I ignored her advice, not ignored it, I didn't comply with it.

60 Q. On this particular occasion, on the Monday we are talking about, Mr. McNeill, what sort of foot apparel did you have on? A. I had an ordinary pair of shoes.

Q. Did you have any rubbers or overshoes or galoshes? A. No, sir, no rubbers.

* * * * *

Q. Now, there came a time when you walked out into the crosswalk and stopped, I believe, as you had testified, attempting to hail a cab. For how long a period were you in the crosswalk attempting to stop a cab?

A. Not more than five minutes. I remember hailing two or three cabs that passed me by.

Q. And you were standing in the crosswalk at this time? A. Yes.

61 Q. Eight or ten feet out into the intersection? A. That is right.

* * * * *

64 REDIRECT EXAMINATION

BY MR. McDONALD:

Q. Now, Mr. McNeill, Mr. Redmon asked you about the testimony about snowing about three o'clock before you fell. I ask you if you can positively state today whether it was snowing or whether the snow you saw was blowing off of the roofs of the buildings. A. Mr. McDonald, it was blowing hard that afternoon and all that day, nearly. Snow fell in my face, and I had the impression that it was falling from above. I don't know whether it was blowing snow from the street or whether it was coming down in a blow from the upper regions. I just don't know.

* * * * *

65 VIVIAN O. HILL

was called as a witness for the plaintiff and, being first duly sworn, was examined and testified as follows:

* * * * *

DIRECT EXAMINATION

BY MR. McDONALD:

Q. Mr. Hill, will you state initially, please, your full name and tell us where you live? A. My name is Vivian O. Hill. I live at 1424 L Street, Northwest.

Q. Now long have you been a resident of the District of Columbia, Mr. Hill? A. Since about 1908.

Q. Now, what is your profession or occupation? A. I am an attorney.

66 Q. And will you tell us where your office is located? A. 622 Southern Building. That is at 15th and H Street, Northwest.

* * * * *

Q. Now, directing your attention to December 12, 1960, I ask you, Mr. Hill, if you had occasion on that day to go to your office in the Southern Building? A. I did.

* * * * *

67 Q. Timewise. Now, do you recall what the condition of the weather was when you ventured out into the street that morning on December 12? A. It was quite cold.

Q. Cold. Had there been any snow? A. Yes, there had been a lot of snow.

* * * * *

70 Q. Did you notice any traffic on 15th Street? A. Well, there wasn't a lot of traffic. There was snow and traffic marks north and south, two lanes, where automobiles would beat the snow down. It was icy, and between those places, there was mounds of snow that hadn't been beaten down. It had footprints in it, and it was very cold and frozen.

* * * * *

71 Q. Did you go out into the crosswalk across between on H Street between the northeast side of 15th Street to the west side? A. I didn't cross the street. I went out. After Mr. McNeill was taken away, I went out at the end of the sidewalk and looked in the street.

* * * * *

Q. What was the condition of the crosswalk as you looked at it? A. Just as I have described it, there was two lanes of automobile traffic which had the snow beaten down; and in between where the automobile tires had not run, the snow was still there; and it that snow, there was evidence of people having walked across it; and it was all frozen.

* * * * *

72 Q. Did you see any evidence of any snow removal in that area? A. At that time I did not.

* * * * *

73 Q. I ask you now, Mr. Hill, as you stood there and looked out into the area that you have described to us, did you see any evidence of any sand or ashes or any salt having been placed there in that area that we are talking about? A. No, I did not.

Q. Did you see any men working around there digging or chopping or removing snow of any kind? A. No, I did not.

Q. Now, redirecting your attention to these ruts that you have told us about, do you have any recollection today or can you tell His Honor and the jury the approximate depth of those ruts that you saw? A. I would have no way to gauge that. The ruts or the snow mounds were up higher than the surface of the street where it had been mashed down by the tires, but how much, I don't know. It was noticeable.

* * * * *

77 CROSS EXAMINATION

BY MR. CLARK:

* * * * *

78 Q. Now, how did you reach your office? A. I walked out L Street to Vermont Avenue, down Vermont Avenue to K Street, or maybe I went on down to "I" Street, crossed over to the east side and went to the Chamberlain Cafeteria first where I eat breakfast as a rule.

* * * * *

79 Q. Now, in walking this distance from your home to the Chamberlain Cafeteria, you crossed a number of streets, is that correct? A. Well, the ones I have described.

Q. Yes. Did you encounter any difficulty in either walking on the sidewalks or crossing the streets at intersections in your travels that morning? A. Well, I think there was a great deal of snow on the street; and whether you call it difficulty walking in it or through it or not, I wouldn't say.

Q. You didn't fall, did you, sir? A. No, I didn't, but it looked dangerous.

* * * * *

81 Q. Tell me, Mr. Hill, how many intersections or streets you

crossed in traveling from your house or home to your office that morning?
 A. Well, I crossed K Street and I crossed 15th Street and either K or H, two.

* * * * *

88

LOUIS ALLEN

was called as a witness for the plaintiff and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. McDONALD:

* * * * *

89

Q. Will you state initially your full name and tell us where you live? A. My name is Louis Allen, and I live in Chevy Chase, Maryland.

* * * * *

Q. Now, what is your profession or occupation? A. I am a meteorologist.

* * * * *

90

MR. McDONALD: I submit him as an expert in the meteorological field, Your Honor.

THE COURT: He may testify. Have you testified in court previously before today?

THE WITNESS: Yes.

91

MR. McDONALD: Your Honor, I would like to at this time have these official weather reports of December 11 and 12, which have been stipulated to, I think they were, Mr. Redmon, at pretrial. Your Honor, I would like to have these marked for identification as the next plaintiff's exhibit. I don't know the number.

THE DEPUTY CLERK: Plaintiff's Exhibit No. 7 for Identification.

(Official Weather Bureau reports, December 11 and 12, 1960, were marked Plaintiff's Exhibit No. 7 for Identification.)

THE COURT: Are these Weather Bureau reports?

MR. McDONALD: Yes, they are.

* * * * *

THE COURT: They will be received in evidence.

THE DEPUTY CLERK: Plaintiff's Exhibit No. 7 in evidence.

(Plaintiff's Exhibit No. 7 for identification was received in evidence and marked Plaintiff's Exhibit No.7.)

* * * * *

93 Q. Now, would you be kind enough, Mr. Allen, to look at the exhibit that you have there for those days of 11 and 12 and tell us generally what the weather was like for those two days in the Washington Metropolitan Area? A. According to these logs and the entries therein, December the 11th was cloudy all day, except beginning approximately 8:30 in the morning of the 11th it began to snow.

* * * * *

94 Q. About what time was that snowing on that log? A. It began snowing at 8:29 a.m., on the 11th.

Q. Yes. A. At that time the temperature was 36 degrees. Then it began to snow more heavily in subsequent hours beginning primarily at 9:56 in the morning. This is what we would call moderate snow rather than light snow, and this continued to 1:15 in the afternoon. Well, actually, the snow continued right on through until it would be about five o'clock in the afternoon when the snow changed to sleet. Then it was sleeting from about five o'clock until eight o'clock, when freezing drizzles, very light freezing drizzles for a period of about one hour. And then it began to sleet and snow again for the remainder of the evening. By evening, it ends at midnight precisely, because it begins a new day.

Then on the 12th, beginning at 21 minutes after midnight, that is the first entry in this log, it was snow and sleet. Then as the early morning hours progressed, I see at 0106 or six minutes after one a.m., there was snow and blowing snow. Snow and blowing snow continued from about one o'clock in the morning on down to - it looks like eleven minutes or ten
95 minutes after ten in the morning, ten minutes after ten; and then at twenty-nine minutes after eleven, there was a little light snow flurry. And, well, that was the last of the snow, as indicated on these records, for December the 12th.

Q. Let me ask you right there, please, what was the time that the last recorded snowfall on the 12th? A. 11:29 a.m.

Q. And do you know what the total amount of snowfall was on the 11th, Mr. Allen? A. That should be in here. The total amount of snowfall by midnight, the 11th, was 6.8 inches.

Q. Now, what was the total for the 12th from midnight of the 11th on into the 12th until the last recording on the morning of the 12th? A. Well, on the 12th, there was an additional 1.7 inches fell on the 12th.

Q. Now, that makes a total of over eight inches. Exactly what was it, 8. what? A. Well, the total amount that fell would be 6.8 plus 1.7 or 8.5; 8.5 inches fell.

* * * * *

116 Q. Mr. Allen, you have read generally to us and interpreted the various recordings there from 9:56 a.m. on Sunday, the 11th, until about 3:00 p.m. on Monday, the 12th. Would you take just a minute and look through there and see if at any time between that period, 9:56 a.m. on Sunday and 3:00 p.m. on the next day, Monday, the 12th, if the temperature ever was above freezing? A. About 3:00 o'clock on the 12th?

Q. Yes, sir. A. No, sir, the temperature was never above freezing during that period.

* * * * *

118 Washington, D. C.
Tuesday, December 3, 1963.

* * * * *

136 CORA BROWN McNEILL
called as a witness by the Plaintiff and, having been first duly sworn, was examined and testified as follows:

137 DIRECT EXAMINATION

BY MR. McDONALD:

* * * * *

Q. Now, I will ask you first if you will give me your full name and tell me where you live. A. Cora Brown McNeill, and I live at 3212 Garfield Street, Northwest.

Q. And you are the wife of the plaintiff in this case, Mr. Robert H. McNeill, are you not? A. I am the wife of Mr. McNeill.

* * * * *

151

CROSS EXAMINATION

BY MR. REDMON:

Q. Mrs. McNeill, do you recall the day when Mr. McNeill stated to you that he had fallen in the downtown area? Do you have any recollection of the day he fell? A. Yes.

Q. Do you recall the morning that he left for work that day? A. Yes.

Q. And do you recall telling Mr. McNeill not to go to work because of the weather conditions? A. I said that I wish he would not go.

Q. And the whether conditions as you saw them that day, how would you describe them? A. Well, it was a very bad day; it snowed.

* * * * *

184

MR. McDONALD: If it has not been offered, I want to offer it in evidence, Your Honor.

With that, the plaintiff rests.

THE COURT: Do you wish to say anything?

(Thereupon, counsel for the defendant made a motion for a directed verdict, which was taken under advisement by the Court.)

* * * * *

186

WILLIAM F. ROEDER

called as a witness on behalf of the defendant and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CLARK:

* * * * *

Q. Will you state your full name, sir? A. William F. Roeder.

* * * * *

Q. And by whom are you employed? A. By the Division of Sanitation, Department of Sanitary Engineering.

Q. How long have you been employed by the District of Columbia?
A. Since 1946, seventeen years.

Q. And what is your present position with the District of Columbia?

187 A. Deputy Superintendent of the Sanitation Division.

Q. And how long have you been employed in that capacity? A. For the past eight years.

Q. Now, in connection with your duties, sir, in your present capacity, would you explain to us briefly what they are? A. They involve trash and garbage collection and disposal, street cleaning, and snow removal activities.

Q. What function do you perform as part of your duties in connection with snow removal activity? A. Deputy in Charge of the overall operation.

Q. And who is in charge of that overall operation? A. The Superintendent, William F. Xanten.

Q. And you are the deputy to Mr. Xanten; is that correct? A. Yes, sir.

Q. Have you been his deputy or been doing this snow removal work for the entire eight-year period? A. Yes; and prior to that when I was staff assistant, I was also doing snow removal work.

Q. And for what period of time, then, Mr. Roeder, have you been or have you worked in connection with snow removal? A. For the full
188 seventeen years I was employed by the District.

* * * * *

Q. Now, would you tell us, Mr. Roeder, in a general way, what provision in the way of plans the District of Columbia has prepared in order to cope with our annual winter snowfall here in the District of Columbia? A. We make thorough preparations in regards to planning ahead, and we have a complete snow program, which involves a booklet of about 80 pages in which it details all the work in connection with the assignment of the various divisions.

Of course, the snow program involves the full Engineering Department of the District, highways, sewer, water, and sanitation, as well as liaison and cooperation with and from the National Capital Parks, and the U. S. Engineers, and we also have under contract the D. C. Transit Company, and approximately a hundred plow contractors, and trucks involving about fifteen contractors --

* * * * *

189

BY MR. CLARK:

Q. Mr. Roeder, this general plan that you have just been discussing, was such a plan in effect in December of 1960? A. Yes, sir, it was.

Q. And was the plan that was in effect in December of 1960 embodied in this eighty-some-page document that you referred to in your testimony? A. Yes, sir.

* * * * *

190

MR. McDONALD: Your Honor, we want, for the record, to object to the snow removal plan as outlined here for this city, and ask that only testimony be given as to the area we are talking about, Fifteenth and H Streets, Northwest.

* * * * *

BY MR. CLARK:

191

Q. Now, Mr. Roeder, in connection with this plan, can you tell me specifically what the plan included in December 1960 insofar as the treatment or removal of snow? What plan did the District of Columbia have with respect to that operation in December 1960?

* * * * *

A. At this particular time, we have a daily snow report, which I can refer to, which show the details of what we did insofar as contacting the Weather Bureau, getting details of when the storm was to start, and mobilizing equipment.

First of all, we mobilize our sanding crews, and the next order of business, if there is going to be more than two inches, we mobilize our plows and plow contractors; and then when there is enough material to deposit along the curb or require physical hauling, we would mobilize our hauling crews and our crosswalk crews.

Some of these plans would be simultaneously and the sanding, of course, would be continuous throughout the storm.

* * * * *

192

Q. Did the District of Columbia, in December of 1960, Mr. Roeder, have any plan or method or means of apprising the public of the condition of a snowstorm, which was imminent or about to descend upon the nation's

Capitol? A. Yes, we had traffic emergency plans, which were in effect at that time.

Q. Can you tell me, in a general way, what those traffic emergency plans were, please? A. There is five plans. Number one is a traffic emergency declared by the Deputy Director of Traffic.

Number two is the early dismissal of government employees.

Number three is a warning issued by the Deputy Director of Traffic Engineering that non-essential trips should be canceled.

Number four is the traffic parking emergency issued by the Deputy Director of Traffic, of no parking in any designated arterial highways.

Number five is issued by the Engineer Commissioner through the White House releasing government employees from work that particular day.

193

Q. Now, in connection with your preparation to testify here today, Mr. Roeder, at my request did you examine the records of your department with respect to snow removal, particularly in connection with the date of December 11 and 12, 1960? Did you examine your records? A. Yes, sir; I have them right here.

* * * * *

194

Q. Can you tell us, sir, from your records, the magnitude of the storm, the snowstorm that we had beginning on December 11, 1960, and what, if anything, the snow removal forces of the District of Columbia did in order to cope with that storm? A. Yes, sir. We had earlier reports. We had the number two map, the weather map from the Weather Bureau, which indicated, some indication of snow for that day, and the actual conditions was, snow occasionally mixed with sleet and freezing rain, fell from 9:00 a.m., to 12:00 noon on December the 12th. The total amount on the ground was eight and a half inches.

To cope with that, we mobilized our sanding crews at 7:00 a.m., in the morning, and we ordered them out at 9:00 a.m.

Q. Now, may I interrupt? You say 7:00 a.m., in the morning. Would you refer to the date? A. The morning of the 11th.

Q. The 11th? A. That is correct.

Q. All right, go ahead. A. And we ordered them out on their routes at 9:30 a.m., on the morning of the 11th.

Later in the day, around noon or one o'clock, it was evident the snowfall was going to be greater than two or three inches, and we mobilized our plowing crews. District crews were mobilized at one o'clock, and the contractors were mobilized at 2:30, and they were ordered out on their routes at 3:30 p.m., on December 11th.

195 The hauling gangs and the crosswalk gangs, the crosswalk gangs were ordered out at 5:00 p.m., on the 11th, and the hauling gangs were mobilized at 8:00 p.m., and ordered out at 8:00 p.m., and they continued their operations until 4:00 a.m., the next morning.

The plows were continuously in operation during the night until 9:00 a.m., on the 12th, and, of course, all during this period sanding operations continued.

Q. Sir, with respect specifically to the area in and about the intersection of Fifteenth and H Streets, Northwest, does the plan for the District of Columbia for the removal of snow or treatment of snow include that intersection? A. It does, sir.

Q. And would you tell us how that intersection is included and what treatment it is to receive within the plan? A. This is an area that is included in the Highway Department --

MR. McDONALD: Just a minute. Your Honor, I don't think that is the test, at all. That is not the purpose in the plan we are talking about. I object to it.

THE COURT: I think, if counsel can direct the witness' attention to what the plan was with respect to Fifteenth and H Street at about the time of the accident in this case.

MR. CLARK: That is all I am talking about.

196 THE COURT: That is all we are interested in, do you understand? The plan that was in operation and what was done at Fifteenth and H Street, Northwest. That is what we want to find out.

* * * * *

BY MR. CLARK:

Q. All right, would you go ahead and tell us that? A. This is in the Highway Department's program, designated to them, and they would clear the intersection first and would do physical hauling.

MR. McDONALD: I hate to interrupt, Your Honor, but we are delving into a plan. I think the witness must be more specific. A plan is one thing and action and work as a result is different.

THE COURT: Well, I don't know whether the witness can testify as to what was done at that particular point on that, unless he has personal knowledge.

All he can testify is, as I understand it, what is reflected in the records he has. That is correct, isn't it?

* * * * *

198

BY MR. CLARK:

Q. Well, what we are interested in is this, Mr. Roeder: What was included within the plan in the District of Columbia for the intersection of Fifteenth and H Streets, and what was done under that plan in and about the intersection of Fifteenth and H Streets, on December 11 and 12, 1960, and if you would answer that question, please? A. The intersection of Fifteenth and H Streets would have been plowed by the route which is on H Street as well as Fifteenth Street.

The snow would be plowed, the snow would be plowed over to the curb, and the crosswalk gangs would be hauling the material from the crosswalks, and the solid hauling gangs would be hauling materials between the intersections.

In addition to that, of course, the sand trucks would be spotting the crosswalks in the downtown area.

199

Q. Now, will you tell us, sir, when plowing operations began in connection with this storm that started on the 11th of December? A. It began at 3:30 p.m., on the 11th.

Q. Now, what forces or equipment of the District of Columbia was utilized in connection with this plowing operation that began on the 11th? A. A total of 212 plows, which included some from Highways, Sanitation, Sewer, as well as contract plows.

Q. Now, under this plowing operation was the intersection of Fifteenth and H Streets, Northwest, included in the area to be plowed? A. Yes, sir, it was.

Q. Now, can you tell me specifically what forces, under the control of the District of Columbia, were utilized in connection with the work to be done at Fifteenth and H Street? A. Other than plowing, you mean?

Q. No, with respect to plowing. A. It would be contract forces on plowing, it would be the Highway Department on hauling, and it would be the Sanitation Division on sanding.

Q. Now, with respect, again, to this plan, and you have indicated you started with the plowing, and what other work was done at the intersection of Fifteenth and H Streets, again, within the overall plan? A. The crosswalks
200 would be cleared, and there would be solid hauling between intersections, plow the intersection first, and then in between the intersections.

Q. Now, can you tell us, from your records, Mr. Roeder, the total number of men that were utilized by the District of Columbia in connection with this storm throughout the District of Columbia?

MR. McDONALD: Your Honor, I am going to object to that. He has told what was done in the plan which embraces something at Fifteenth and H, and I didn't object to that.

But we are not interested in the overall. We are not interested in how many men were working at Chevy Chase, or Georgetown, or Anacostia.

THE COURT: Well, do you have any records which indicate when and how the snow was removed, if it was removed, from the area of Fifteenth and H Street? Is there any specific record on that?

THE WITNESS: We have specific records in connection with the downtown crosswalk gangs which went out at 5:00 p.m., on the 11th.

THE COURT: What would be included in the downtown crosswalks?

THE WITNESS: That would cover everything from Fifth Street to Twenty-First, and from Constitution Avenue to K Street.

201 THE COURT: Northwest?

THE WITNESS: That is correct.

THE COURT: I think if he restricts his testimony to that area, that would give the jury some idea.

MR. CLARK: Very well, Your Honor.

BY MR. CLARK:

Q. With respect to this downtown area, this part of the plan, Mr. Roeder, can you tell us the number of men and the number of pieces of equipment that were utilized in connection with the snowstorm of December 11, 1960? A. I don't have it broken down into just what was utilized in the downtown area.

The total number of men utilized in hauling, which would have included the downtown area, as well as some of the outlying, like Georgetown, was 828 men.

Q. How about the number of vehicles or equipment? A. 254 trucks.

MR. McDONALD: The same objection, Your Honor. They could have had 800 vehicles all over Washington and not have one down where we are talking about.

THE COURT: Let me see if I can find out.

Do you have any breakdown there or any figures showing the number of trucks or vehicles or anything like that that you used in the area bounded by, I think, Fifth Street -- and what was it, Constitution Avenue?

THE WITNESS: Fifth to Twenty-First, and Constitution Avenue to K.

THE COURT: In that area, would you call that downtown?

THE WITNESS: No, it also includes the area in Georgetown, and I would say two-thirds of this was utilized in downtown.

* * * * *

BY MR. CLARK:

Q. What was done at Fifteenth and H Streets in connection with the plowing operation, Mr. Roeder? A. First, the hauling gangs would go out, after the plows had been out there a number of hours, and the intersection would have been cross-plowed by trucks on Fifteenth Street and H Street, so that most of the material, the snow, would have been pushed over to the curb.

Q. Is Fifteenth Street one of the streets on the plowing routes? A. Yes, sir.

Q. In the downtown area? A. Fifteenth and H Streets, both are on it.

Q. Do you have any records there, sir, that reflect the number of vehicles that were used in connection with the plowing operation on Fifteenth Street? A. In Fifteenth Street, the width of that street, would normally carry two plows.

Q. How about H Street? A. H Street, the width of that street, would normally carry two plows.

Q. And is plowing the first operation that is undertaken when we have a snowstorm upon us? A. Sanding would be the first operation, plowing would follow that.

Q. And are there any other operations that follow plowing, sir?

204 A. The crosswalk work and the hauling.

* * * * *

Q. Will you tell me, sir, how many intersections like Fifteenth and H there are in the District of Columbia? A. There are approximately 7500 intersections throughout the District.

* * * * *

Q. Will you tell us how many miles of roadway we have in the District of Columbia? A. 1265 miles.

Q. And how about the number of miles, linear miles of sidewalk?

205 * * * * *

A. Approximately 2200 miles of sidewalk.

Q. Do you have any actual knowledge, Mr. Roeder, of the intersection of Fifteenth and H Street on December the 11th or December the 12th, 1960? A. No, sir, I am afraid I would not have a recollection.

206 Q. Do you, or does the Department maintain a record of complaints received by it concerning conditions in the city? A. They keep a record of complaints or requests.

Q. Was such a record kept in December of 1960, sir? A. It was, sir.

Q. In connection with your preparation for your testimony here today, did you make any effort to examine the record of complaints for

December 1960? A. I checked the record.

Q. Did you find in that record, sir, any specific complaints concerning the intersection of Fifteenth and H Streets, Northwest?

MR. McDONALD: Don't answer that. I object, Your Honor, because the complaint would not, in itself, be evidence here in this case as to the condition at three o'clock, the time of the fall.

* * * * *

THE COURT: I don't know exactly what you are trying to develop.

MR. CLARK: I am trying to develop that there is no record of any complaint concerning the Fifteenth and H Street intersection in
207 advance of the time Mr. McNeill fell.

THE COURT: Well, suppose that there were no complaints made, what would that prove? What is the probative value of that? That this man wasn't hurt?

MR. CLARK: No; there is the question of notice.

* * * * *

208 THE WITNESS: I could not find any requests or complaints for that particular intersection.

* * * * *

BY MR. CLARK:

209 Q. Mr. Roeder, in connection with the District handling of snowstorms, did it maintain any liaison with the United States Weather Bureau in December of 1960? A. Yes, we have a constant liaison with the Weather Bureau as well as receiving a daily weather map.

* * * * *

Q. Now, what was the 1:30 p.m., report from the Weather Bureau?
A. Heavy snow warning; snow this afternoon and evening, falling in the 20's tonight; accumulation four inches or more; temperature 31 degrees at 1:30 p.m.

Q. Now, did the District of Columbia respond in any way to those reports? A. We did. We put the usual traffic emergency snow plans into effect, and also mobilized our forces accordingly.

210 Q. Do your records specifically reflect what was done at that time, sir? A. Yes, sir. The snow plans were put into effect at various times. I can give you that if you like.

Q. Will you do that? A. The first one that was put into effect, I believe, was the number three plan, which is the warning to motorists that non-essential motor trips be canceled. That was put in at 10:00 a.m., on the 11th.

At 3:50 p.m., on the 11th, the declaration of a parking emergency by the Deputy Director of Traffic and Engineering, was put into effect on the 11th, that is, to eliminate cars from parking on the arterial highways so that we can do a thorough plowing job and get all the snow over to the curbs.

At 5:35 a.m., on the 12th, plan number five was put into effect and that is where announcement by the White House, upon the advice of the District Engineer Commissioner, of the closing of federal and District offices, and excusing their employees from duty without charge to annual leave, except, of course, those that had been previously designated as necessary for indispensable work.

Q. When was that put into effect, sir? A. 5:35 a.m., on the 12th.

211 Q. Now, in connection with this storm of December the 11th, when did the District of Columbia, if they did, mobilize any of their forces? A. The first forces were mobilized at 7:00 a.m., on the 11th, the sand crews.

Q. Do your records reflect what forces were mobilized and in what number? A. Yes, sir.

Q. Will you tell us what they were? A. At seven o'clock, as I stated, the sand crews were mobilized, and there was a total of 99 regular large jet sanders.

Q. What is a jet sander? A. It is a large ten to fifteen cubic yard truck with an automatic sand spreader on the back, which spreads sand across the width of a street, anywhere from, it can spread it anywhere from five feet to forty feet in width as it continues on its route.

Q. Now, what do your records reflect with respect to other forces mobilized at or about that time? A. The District plow trucks, the District forces were mobilized at 1:00 p.m., and the contractor units were mobilized at 2:30 p.m., and they were ordered out at 3:30 the same day, on the 11th.

212 Q. What number did you have at that time, including contract forces and the District forces? A. 212 plow trucks.

Q. Now, what, if anything else, was done? A. 5:00 p.m., the same day, the 11th, the special downtown crosswalk crews were mobilized, and they were also put out around five or shortly after, and that involved a number of the regular labor forces in that particular area, approximately 50 men.

* * * * *

Q. Now, will you tell us again, sir, if you have not already done so, what this special downtown force was called upon to do in December 1960? A. Well, these are the crosswalk men that do nothing but
213 clear the crosswalks from curb to curb, and they are put out in advance of the regular hauling gangs. The regular hauling gangs were put out at eight o'clock that night. This is in advance of the regular hauling.

Q. Now, as to the downtown area, which you have described previously, what is its position within the overall scheme in the treatment of snow in the District of Columbia in December of 1960?

* * * * *

A. It is given special treatment insofar as the physical removal of the snow, yes, the downtown and outlying business areas. In downtown and Georgetown the snow is physically removed from these areas, whereas, it is not on, say, upper Connecticut Avenue or upper Sixteenth Street.

214 There it is just plowed to the curbs to remain there.

Q. Now, with respect to the forces that were mobilized on the 11th of December, 1960, can you tell us from your records what hours they worked? A. Yes. The sanding crews, of course, were mobilized

at seven and put out at 9:30, and they would be working on twelve-hour shifts around the clock for several days, until all icy conditions no longer existed, insofar as requests, and they would cover their sanding routes and after that they would go on requests.

The plow trucks, the contractors units as well as the District plow trucks, were run from 3:30 p.m., on the 11th until 9:00 a.m., on the 12th, and after 9:00 a.m., a number of plows are kept on to handle special conditions and requests.

The hauling gangs and the crosswalk gangs were on from five o'clock and 8:00 p.m., and they were on until four o'clock in the morning and were told to return to their assignments at 12:00 Noon on the 12th.

* * * * *

215 Q. And were any additional forces mobilized for December 12, 1960? A. The hauling crews were again called out at 12:00 Noon on the 12th, and they worked until 8:00 p.m., that night.

Q. Does your report and record reflect the total snowfall that came down on the 11th and 12th of December, 1960? A. Yes, sir; it was eight and a half inches.

Q. From your experience in handling these snow problems, Mr. Roeder, how did that snowstorm compare with others of the same season? A. It was the worst one we had that year.

MR. McDONALD: I object to that, Your Honor.

* * * * *

218 CROSS-EXAMINATION

BY MR. McDONALD:

* * * * *

221 Q. Now, I think you also said that, in this, what you described as the downtown business area, and in particular Fifteenth Street and on H Street, this plan contemplated two plows on Fifteenth Street and two plows on H Street; is that your testimony on Fifteenth and H? A. That is right. The route covering Fifteenth Street would normally have two plows on it, and the route on H Street would have two plows on it.

* * * * *

222 Q. Now, do you have any personal knowledge, from your study of this case, Mr. Roeder, that at any time from the time those plows started to work on Sunday, that they ever plowed Fifteenth Street across H Street, and the northeast crosswalk at Fifteenth and H Street? Do you have any personal knowledge of that? A. Only from my reports. ***

* * * * *

Q. Now, when would they normally be expected to complete their assignment of plowing on Fifteenth Street? A. It depends on the depth of the snow and the length of the route. Normally an eight-inch snow, it would take anywhere from 12 to 15 hours.

* * * * *

225 Q. Well, do you have any record there from the sanding crew or the crew which had charge of cleaning the crosswalks at Fifteenth and H Streets, that they had ever been cleared or that they had ever been sanded? A. The foremen in the area would be checking as far as their doing the crosswalks are concerned, and they would report to us, and the sanding crews would report by radio when they had completed their assignment and they would be given other assignments.

Q. Now, you are telling me what somebody would have done, but I am asking you, Mr. Roeder, do you have anything there that would tell His Honor and these ladies and gentlemen of the jury, in those records, that anybody ever called or put anything into the record to show that the crosswalks at Fifteenth and H were ever cleared or ever sanded on the 11th or 12th of December, 1960? A. No, sir. We do not keep a record of every intersection that is cleared, or every intersection or traffic light that is sanded. It would be a physical impossibility, I think.

* * * * *

231 Q. Now, this sanding operation, you said the sanding crews worked for 12 hours? A. I said they normally work on 12-hour shifts.

* * * * *

233 Q. Now, one last question, Mr. Roeder, and I think you did tell us

that you and your associate there had been out on the street during this storm, but you had no personal knowledge of being at Fifteenth and H Streets; is that correct? A. We probably covered Fifteenth and H but I have no personal knowledge of it at that time.

* * * * *

235 Q. You would ordinarily cover those streets. Now, what conditions, can you tell us what you saw, and let us take Fifteenth, and do you have any recollection today of seeing any part of Fifteenth Street, that you can tell us about the condition of? A. In 1960, no, I have no recollection of any particular street. There have been a number of storms since then, and I could not recollect that.

* * * * *

Q. You cannot give us any opinion as to the condition or describe the condition? A. No; I would say, generally the conditions were, that we were working according to plan, and we were doing everything possible, and we had all the forces we could muster out to do the best work we possibly could, and we had better than 1500, close to 2,000 men working on the storm, sanding, plowing and hauling, and I think we were doing everything physically possible.

* * * * *

240 December 4, 1963

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241 THE COURT: Have both sides rested?

MR. McDONALD: Yes, sir.

MR. CLARK: Yes, sir.

THE COURT: Are there any motions to be made?

(Thereupon, counsel for the defendant renewed the motion for a directed verdict, which was denied by the Court.)

* * * * *

242 December 5, 1963

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277-A (At 2:10 o'clock p.m., the jury returned to the courtroom and the

Foreman announced a verdict in favor of the defendant.)

(Thereupon the trial was concluded.)

[Filed December 5, 1963]

VERDICT AND JUDGMENT

This cause having come on for hearing on the 2nd day of December, 1963, before the Court and a jury of good and lawful persons of this district, to wit:

Mrs. Grace T. Bazemore	Don J. Wyatt
Garnett G. Adams	Wallace Perkins
Seward F. Parker	Mrs. Clara Lee Calhoun
Richard I. Lewis	Alfonso L. Brooks
James A. Walker	Mrs. Harrie P. Meredith
Karl Scharf	John J. Javins

who, after having been duly sworn to well and truly try the issues between Robert H. McNeill, plaintiff and the District of Columbia, a Municipal Corporation, defendant and after this cause is heard and given to the jury in charge, they upon their oath say this 5th day of December, 1963, that they find for the defendant against said plaintiff.

WHEREFORE, it is adjudged that said plaintiff take nothing by this action, that said defendant go hence without day, be for nothing held and recover of plaintiff their costs of defense.

(n)

Harry M. Hull, Clerk

By direction of

By /s/ Anne W. Lyddane
Deputy Clerk

Judge John J. Sirica

[Filed January 30, 1964]

NOTICE OF APPEAL

Notice is hereby given this 30th day of January, 1964, that Robert H. McNeill, Plaintiff, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 5th day of December, 1964 in favor of District of Columbia, defendant, against said Robert H. McNeill.

/s/ Wesley E. McDonald

Attorney for Plaintiff

The Clerk will please mail copy to
George S. Clark, Esquire, Assistant
Corporation Counsel for the District
of Columbia, District Building,
Washington, D. C.
